NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
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FEDERAL REGISTER

Vol. 81 Monday,
No. 99 May 23, 2016

Pages 32227–32616

OFFICE OF THE FEDERAL REGISTER

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2015–8426; Directorate Identifier 2015–NM–006–AD; Amendment 39–18527; AD 2016–10–16]

RIN 2120–AA64

Airworthiness Directives; Dassault Aviation Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Dassault Aviation Model MYSTERE-FALCON 900 airplanes, FALCON 900EX airplanes, and FALCON 2000EX airplanes. This AD was prompted by a report that during a test flight, it was found that the yaw damper on the takeoff roll can increase the Minimum Control Speed on Ground (Vmcg). This AD requires revising the airplane flight manual (AFM) to incorporate procedures for the flightcrew to check that the yaw damper is set to "off" before takeoff. We are issuing this AD to ensure that the flightcrew has procedures to set the yaw damper to "off" before takeoff, which, if activated, could result in reduced control of the airplane if one engine were to fail during takeoff.

DATES: This AD is effective June 27, 2016.

ADDRESSES:

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–8426; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone 800–647–5527) is Docket Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1137; fax 425–227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Dassault Aviation Model MYSTERE-FALCON 900 airplanes, FALCON 900EX airplanes, and FALCON 2000EX airplanes. The NPRM published in the **Federal Register** on January 13, 2016 (81 FR 1580) ("the NPRM").

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA Airworthiness Directive 2015–0005, dated January 14, 2015 (referred to after this as the Mandatory Continuing Airworthiness Information, or "the MCAI"), to correct an unsafe condition for certain Dassault Aviation Model MYSTERE-FALCON 900 airplanes, FALCON 900EX airplanes, and FALCON 2000EX airplanes. The MCAI states:

> During a flight test on a development aeroplane, it was found that the yaw damper (YD) working on the take-off roll can increase the Minimum Control Speed on Ground (Vmcg). A review of the certification data of the affected aeroplanes shows that Vmcg values published in the Airplane Flight Manuals (AFM) have been determined without YD.
>
> This condition, if not corrected, could result, in case of an engine failure occurring during the roll acceleration [during takeoff], in reduced lateral control of the aeroplane.
>
> To address this condition, Dassault Aviation developed Change Proposals (CP) and Temporary Changes (TC) to the applicable AFMs, which instruct flight crews to check that yaw damper is set to "off" before take-off.
>
> For the reasons described above, this [EASA] AD requires an amendment of the applicable AFM.

You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–8426.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

We reviewed the relevant data and determined that air safety and the public interest require adopting this AD as proposed except for minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Change to Paragraph (g) of This AD

We have revised paragraph (g) of this AD to remove "table 1 to paragraph (g) of this AD" regarding the use of the applicable AFM change. This change is necessary because the AFM materials specified in the proposed AD do not meet the requirements for approval of incorporation by reference by the Office of the Federal Register. Therefore, operators must contact the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, for information regarding the use of the applicable AFM change for revising the normal procedures and limitations sections of the AFM, as applicable, to include new yaw damper procedures.

Costs of Compliance

We estimate that this AD affects 284 airplanes of U.S. registry.

We also estimate that it would take about 1 work-hour per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of this AD on U.S. operators to be $24,140, or $85 per product.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. "Subtitle VII: Aviation Programs," describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in "Subtitle VII, Part A, Subpart III, Section 44701: General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

1. Is not a "significant regulatory action" under Executive Order 12866;
2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);
3. Will not affect intrastate aviation in Alaska; and
4. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

2016–10–16 Dassault Aviation: Amendment 39–18527. Docket No. FAA–2015–8426; Directorate Identifier 2015–NM–006–AD.

(a) Effective Date

This AD is effective June 27, 2016.

(b) Affected ADs

None.

(c) Applicability

This AD applies to the airplanes specified in paragraphs (c)(1), (c)(2), and (c)(3) of this AD, certificated in any category.

(1) Dassault Aviation Model MYSTERE-FALCON 900 airplanes, all serial numbers.

(2) Dassault Aviation Model FALCON 900EX airplanes, all serial numbers, except airplanes with "EASy II" "2nd certification" avionics, which are defined as: Airplanes modified in production with Dassault Aviation modification M5595; or airplanes modified in service with Dassault Aviation Service Bulletin F900EX–400 or with Dassault Aviation Service Bulletin F900EX–414, except for airplanes modified in service with any of the service information specified in paragraphs (c)(2)(i) through (c)(2)(vii) of this AD.

(i) Dassault Aviation Service Bulletin F900EX–400, dated July 1, 2011.

(ii) Dassault Aviation Service Bulletin F900EX–400, Revision 1, dated July 5, 2012.

(iii) Dassault Aviation Service Bulletin F900EX–400, Revision 2, dated November 30, 2012.

(iv) Dassault Aviation Service Bulletin F900EX–414, dated July 20, 2011.

(v) Dassault Aviation Service Bulletin F900EX–414, Revision 1, dated July 5, 2012.

(vi) Dassault Aviation Service Bulletin F900EX–414, Revision 2, dated July 27, 2012.

(vii) Dassault Aviation Service Bulletin F900EX–414, Revision 3, dated November 30, 2012.

(3) Dassault Aviation Model FALCON 2000EX airplanes, all serial numbers, except airplanes with Dassault Aviation production modification M3254, or modified in service by Dassault Aviation Service Bulletin F2000EX–300 ("EASy II" avionics).

(d) Subject

Air Transport Association (ATA) of America Code 01, Operations Information.

(e) Reason

This AD was prompted by a report that during a test flight, it was found that the yaw damper on the takeoff roll can increase the Minimum Control Speed on Ground (Vmcg). We are issuing this AD to ensure that the flightcrew has procedures to set the yaw damper to "off" before takeoff, which, if activated, could result in reduced control of the airplane if one engine were to fail during takeoff.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Revision of the Airplane Flight Manual (AFM)

Within 30 days after the effective date of this AD, revise the normal procedures and limitations sections of the AFM, as applicable, to include new yaw damper procedures, in accordance with using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA.

(h) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1137; fax 425–227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA); or Dassault Aviation's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(i) Related Information

Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA Airworthiness Directive 2015–0005, dated January 14, 2015, for related information. This MCAI may be found in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2015–8426–0002.

(j) Material Incorporated by Reference

None.

Issued in Renton, Washington, on May 12, 2016.

Suzanne Masterson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–11929 Filed 5–20–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 669

[FHWA Docket No. FHWA–2016–0004]

RIN 2125–AF71

Heavy Vehicle Use Tax; Technical Correction

AGENCY: Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: This rule makes a technical correction to the regulations that govern the enforcement of the Heavy Vehicle Use Tax. The amendments contained herein make no substantive changes to FHWA regulations, policies, or procedures. The current regulation references a section of the United States Code that was later amended by the Moving Ahead for Progress in the 21st Century Act (MAP–21).

DATES: This rule is effective June 22, 2016.

FOR FURTHER INFORMATION CONTACT: Michael Dougherty, Office of Highway Policy Information, telephone 202–366–9234 or email at *michael.dougherty@dot.gov;* or William Winne, Office of the Chief Counsel, telephone 202–366–1397 or email at *william.winne@dot.gov*. Both are located at 1200 New Jersey Avenue SE., Washington, DC 20590. Office hours for FHWA are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may be downloaded by accessing the Office of the Federal Register's home page at: *http://www.archives.gov* or the Government Printing Office's Web page at: *http://www.gpoaccess.gov/nara*.

Background

This rulemaking makes technical corrections to the regulations that govern policies and procedures relating to the enforcement of the Heavy Vehicle Use Tax found at 23 CFR part 669. In the final rule published in the **Federal Register** on July 26, 2010 (75 FR 43409), FHWA referenced 23 U.S.C. 104(b)(4) in 23 CFR 669.13 and 669.19, which at that time governed the effect of failure to certify or to adequately obtain proof-of-payment and the reservation and reapportionment of funds. Section 1404(d)(2) of MAP–21 (PL 112–141), enacted in 2012, amended that section and inserted revised language governing the Heavy Vehicle Use Tax at 23 U.S.C. 104(b)(1). As a result of the language in MAP–21, the penalty for States for non-compliance with the proof of payment requirements of the Federal Heavy Vehicle Use Tax at the time of State registration was amended. The penalty computation was amended by statute to eight percent of the amount apportioned in any fiscal year beginning after September 30, 1984 (23 U.S.C. 104(b)(1)) as was reference to the amended portion of the statute at section 104(b)(1).

However, the regulations in 23 CFR part 669 have several references to the old statute at 23 U.S.C. 104(b)(4) and also suggest the penalty is 25 percent rather than 8 percent. As such, references in 23 CFR 669.13 and 669.19 to 23 U.S.C. 104(b)(4) cause confusion. These amendments will direct readers of 23 CFR 669 to the proper section of 23 U.S.C.

Finally, the authority citation for part 669 will be updated to reflect ministerial changes in the numbering of FHWA delegations of authority made with the publication of the final rule on Organization and Delegation of Powers and Duties on August 17, 2012 (77 FR 49964, 49981). The current regulation cites authority contained in 49 CFR 1.48. The location of those sections describing delegations to the Federal Highway Administrator are now found at 49 CFR 1.85.

The 2012 change in location within the CFR is ministerial in nature and pertains to DOT management and organization. Amendment of the section identifying the authority for part 669 will direct readers to the proper section of 49 CFR.

Rulemaking Analyses and Notice

Under the Administrative Procedure Act (5 U.S.C. 553(b)), an agency may waive the normal notice and comment requirements if it finds, for good cause, that they are impracticable, unnecessary, or contrary to the public interest. The FHWA finds that notice and comment for this rule is unnecessary and contrary to the public interest because it will have no substantive impact, is technical in nature, and relates only to management, organization, procedure, and practice. The amendments to the rule are based upon the explicit language of statutes that were enacted subsequent to the promulgation of the rule. The FHWA does not anticipate receiving meaningful comments on it. State and local governments rely upon the regulations corrected by this action. These corrections will reduce confusion for these entities and should not be unnecessarily delayed. Accordingly, for the reasons listed above, FHWA finds good cause under 5 U.S.C. 553(b)(3)(B) to waive notice and opportunity for comment.

Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures

The FHWA has determined that this final rule is not a significant regulatory action within the meaning of Executive Orders 12866 or significant within the meaning of DOT regulatory policies and procedures. This action complies with Executive Orders 12866 and 13563 to improve regulation. It is anticipated that the economic impact of this rulemaking will be minimal. This final rule only makes minor corrections that will not alter the regulatory effect of 23 CFR 669. Thus, the final rule will not adversely affect, in a material way, any sector of the economy. In addition, these changes will not interfere with any action taken or planned by another agency and will not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354), FHWA has evaluated the effects of this action on small entities and has determined that the action will not have a significant economic impact on a substantial number of small entities. The final rule will not make any substantive changes to our regulations or in the way that our regulations affect small entities; it merely corrects technical errors. For this reason, FHWA certifies that this action will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This final rule does not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). This final rule does not impose any requirements on State, local, or tribal governments, or the private sector and, thus, will not require those entities to expend any funds.

Executive Order 13132 (Federalism)

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132. The FHWA has determined that this final rule does not have sufficient federalism implications to warrant the preparation of a federalism assessment. The FHWA has also determined that this final rule does not preempt any

State law or State regulation or affect the States' ability to discharge traditional State governmental functions.

Executive Order 12372 (Intergovernmental Review)

The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to these programs.

Paperwork Reduction Act

This final rule does not create any new information collection requirements for which submission to the Office of Management and Budget would be needed under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

National Environmental Policy Act

The FHWA has analyzed this final rule for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4347) and has determined that this action will not have any effect on the quality of the environment.

Executive Order 13175 (Tribal Consultation)

The FHWA has analyzed this final rule under Executive Order 13175. The FHWA concluded that the final rule will not have substantial direct effects on one or more Indian tribes; will not impose substantial direct compliance costs on Indian tribal government; and will not preempt tribal law. There are no requirements set forth in the final rule that directly affect one or more Indian tribes. Therefore, a tribal summary impact statement is not required.

Executive Order 12988 (Civil Justice Reform)

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988 to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13045 (Protection of Children)

Under Executive Order 13045 this final rule is not economically significant and does not involve an environmental risk to health and safety that may disproportionally affect children.

Executive Order 12630 (Taking of Private Property)

This final rule will not affect a taking of private property or otherwise have taking implications under Executive Order 12630.

Executive Order 13211 (Energy Effects)

This final rule has been analyzed under Executive Order 13211. The FHWA has determined that it is not a significant energy action under that order because it is not a significant regulatory action under Executive Order 12866 and this final rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RINs contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 23 CFR Part 669

Excise taxes, Grant programs-transportation, Highways and roads, Motor vehicles.

Issued on: May 13, 2016.

Gregory G. Nadeau,

Administrator, Federal Highway Administration.

In consideration of the foregoing, 23 CFR part 669 is amended as set forth below.

PART 669—ENFORCEMENT OF HEAVY VEHICLE USE TAX

■ 1. Revise the authority citation for part 699 to read as follows:

Authority: 23 U.S.C. 141(c) and 315; 49 CFR 1.85.

■ 2. Revise § 669.13 to read as follows:

§ 669.13 Effect of failure to certify or to adequately obtain proof-of-payment.

If a State fails to certify as required by this regulation or if the Secretary of Transportation determines that a State is not adequately obtaining proof-of-payment of the heavy vehicle use tax as a condition of registration notwithstanding the State's certification, Federal-aid highway funds apportioned to the State under 23 U.S.C. 104(b)(1) for the next fiscal year shall be reduced in an amount up to 8 percent as determined by the Secretary.

■ 3. Amend § 669.19 by revising paragraph (a) and the first sentence of paragraph (b) to read as follows:

§ 669.19 Reservation and reapportionment of funds.

(a) The Administrator may reserve from obligation up to 8 percent of a State's apportionment of funds under 23 U.S.C. 104(b)(1), pending a final determination.

(b) Funds withheld pursuant to a final administrative determination under this regulation shall be reapportioned to all other eligible States pursuant to the formulas of 23 U.S.C. 104(b)(1) and the apportionment factors in effect at the time of the original apportionments, unless the Secretary determines, on the basis of information submitted by the State, that the state has come into conformity with this regulation prior to the final determination. * * *

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[FR Doc. 2016–11961 Filed 5–20–16; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms, and Explosives

27 CFR Part 478

[Docket No. ATF 2008R–15P; AG Order No. 3670–2016]

RIN 1140–AA38

Federal Firearms License Proceedings—Hearings

AGENCY: Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), Department of Justice.

ACTION: Final rule.

SUMMARY: The Department of Justice is amending the regulations of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) regarding administrative hearings held as part of firearms license proceedings. This rule clarifies that persons requesting a hearing will be afforded the opportunity to submit facts and arguments for review and consideration during the hearing, and may make offers of settlement before or after the hearing. The regulations are intended to ensure that Federal firearms licensees and persons applying for a Federal firearms license are familiar with the hearing process relative to the denial, suspension, or revocation of a firearms license, or imposition of a civil fine.

DATES: This rule is effective July 22, 2016.

FOR FURTHER INFORMATION CONTACT: Shermaine Kenner, Office of Regulatory Affairs, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Department of Justice, 99 New York Avenue NE., Washington, DC 20226; telephone: (202) 648–7070.

SUPPLEMENTARY INFORMATION:

I. Background

The Attorney General is responsible for enforcing the Gun Control Act of 1968 (the Act), 18 U.S.C. Chapter 44. She has delegated that responsibility to the Director of ATF (Director), subject to the direction of the Attorney General and the Deputy Attorney General. 28 CFR 0.130(a). ATF has promulgated regulations that implement the Act in 27 CFR part 478.

The regulations in subpart E of part 478, §§ 478.71–478.78, relate to proceedings involving Federal firearms licenses, including the denial, suspension, or revocation of a license, or the imposition of a civil fine. In particular, § 478.71 provides that the Director may issue a notice of denial, ATF Form 4498, to an applicant for a license if he has reason to believe that the applicant is not qualified, under the provisions of § 478.47, to receive a license. The notice sets forth the matters of fact and law relied upon in determining that the application should be denied, and affords the applicant 15 days from the date of receipt of the notice in which to request a hearing to review the denial. If a request for a hearing is not filed within such time, the application is disapproved and a copy, so marked, is returned to the applicant.

Under § 478.72, an applicant who has been denied an original or renewal license may file a request with the Director of Industry Operations for a hearing to review the denial of the application. On conclusion of the hearing and after consideration of all relevant facts and circumstances presented by the applicant or his representative, the Director renders a decision confirming or reversing the denial of the application. If the decision is that the denial should stand, a certified copy of the Director's findings and conclusions is furnished to the applicant with a final notice of denial, ATF Form 5300.13.[1] In addition, a copy of the application, marked "Disapproved," is returned to the applicant. If the decision is that the license applied for should be issued, the applicant is so notified, in writing, and the license is issued.

Section 478.73 provides that whenever the Director has reason to believe that a firearms licensee has willfully violated any provision of the Act or part 478, a notice of revocation of the license, ATF Form 4500, may be issued. In addition, a notice of revocation, suspension, or imposition of a civil fine may be issued on ATF Form 4500 whenever the Director has reason to believe that a licensee has knowingly transferred a firearm to an unlicensed person and knowingly failed to comply with the requirements of 18 U.S.C. 922(t)(1) (relating to a National Instant Criminal Background Check System (NICS) background check) with respect to the transfer and, at the time that the transferee most recently proposed the transfer, the NICS was operating and information was available to the system demonstrating that the transferee's receipt of a firearm would violate 18 U.S.C. 922(g) or 922(n) or State law. Additionally a notice of suspension or revocation of a license, or the imposition of a civil penalty, may be issued whenever the Director has reason to believe that a licensee has violated § 922(z)(1) by selling, delivering, or transferring any handgun to any person other than a licensee unless the transferee was provided with a secure gun storage or safety device for that handgun.

As specified in 27 CFR 478.74, a licensee who has received a notice of license suspension or revocation of a license, or imposition of a civil fine, may, within 15 days of receipt, file a request for a hearing with the Director of Industry Operations. On conclusion of the hearing and after consideration of all the relevant presentations made at the hearing, the Director renders a decision and prepares a brief summary of the findings and conclusions on which the decision is based. If the decision is that the license should be revoked or, in actions under 18 U.S.C. 922(t)(5) or 924(p)(1), that the license should be revoked or suspended, or that a civil fine should be imposed, a certified copy of the summary is furnished to the licensee with the final notice of revocation, suspension, or imposition of a civil fine on ATF Form 5300.13. If the decision is that the license should not be revoked, or in actions under §§ 922(t)(5) or 924(p)(1), that the license should not be revoked or suspended, and a civil fine should not be imposed, the licensee is notified in writing.

Under 27 CFR 478.76, a firearms licensee or an applicant for a firearms license may be represented at a hearing by an attorney, certified public accountant, or other person recognized to practice before ATF, provided certain requirements are met. The Director may be represented in hearing proceedings by an authorized attorney in the Office of Chief Counsel. Pursuant to § 478.77, hearings concerning license denials, suspensions, or revocations, or the imposition of a civil fine, must be held in a location convenient to the aggrieved party.

In addition, ATF has published in the **Federal Register** its procedures regarding administrative hearings held as part of firearms license proceedings. *See* ATF 36N, 75 FR 48362, Aug. 10, 2010.

II. Proposed Rule—Clarification of Hearing Proceedings

On February 3, 2012, ATF published in the **Federal Register** a notice of proposed rulemaking (NPRM) amending the regulations in subpart E of part 478, sections 478.71–478.78 (Notice No. 32P, 77 FR 5460). The proposed regulations were intended to ensure that Federal firearms licensees and applicants for a Federal firearms license are familiar with the hearing process relative to the denial, suspension, or revocation of a firearms license, or imposition of a civil fine.

Specifically, the NPRM proposed to add language stating that a hearing would be informal and that a licensee or applicant would have the opportunity to submit facts, arguments, offers of settlement, or proposals of adjustment for review and consideration as part of the hearing process. While the opportunity for a licensee or applicant to submit additional material for review and consideration has always been afforded to such parties since the enactment of the Act, this clarification of the regulations was intended to ensure that all parties involved in firearms license administrative hearings are fully aware of these opportunities.

The comment period for Notice No. 32P closed on May 3, 2012.

III. Summary of Comments

All public comments were considered in preparing this final rule. In response to Notice No. 32P, ATF received ten comments. Five of the commenters agreed with the proposed rule. Commenters who agreed with the proposed rule primarily did so because they believed that implementation of the rule would clarify the opportunities available to an applicant or licensee requesting a hearing in response to a notice of the denial, revocation, or suspension of a firearms license, or imposition of a civil fine. Commenters who disagreed with the proposed rule did so for a variety of reasons, with the most common objection relating to the proposed addition of the term "informal" as applied to firearms license administrative hearings.

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[1] ATF Form 5300.13 was previously referred to as ATF Form 4501.

General Comments on the Proposed Rule

One commenter stated that the proposed rule should better clarify what conduct can lead to a revocation, denial, or suspension of a Federal firearms license so that a person applying for a license can be on notice of the possibilities before taking the steps to get the license. Existing regulations in part 478, however, already specify which actions and violations by a licensee or applicant may lead to a license denial, revocation, or suspension, or imposition of a civil fine. Therefore, clarification of this matter is not needed.

One commenter stated, "[i]n order to ensure that Federal firearms licensees and applicants for a Federal firearms license are familiar with the hearing process relative to the denial, suspension, or revocation of a firearms license, or imposition of a civil fine, the information regarding the process and procedures for the denial hearing should be included in the Director of Industry Operation's report that is sent to the applicant or licensee." ATF already follows this practice: The notice of denial, revocation, suspension, or imposition of a civil fine includes information concerning specific procedures on how to request a hearing, a citation to the applicable regulations, and a pamphlet on the hearing process. In addition, information regarding the hearing process as well as what is required from an applicant or licensee can be found in §§ 478.72 and 478.74, and the hearing procedures were published by ATF in the **Federal Register** on August 10, 2010 (ATF 36N, 75 FR 48362). Accordingly, there is no need to change the language of this regulation to address the commenter's concern.

One commenter argued that this proposed rule will likely cause crime to rise by making it more difficult for law-abiding citizens to have access to firearms. The same commenter stated that penalties for violations where the Director has reason to believe that a licensee has knowingly transferred a firearm to an unlicensed person and knowingly failed to comply with the requirements of 18 U.S.C. 922(t)(l) should be strengthened. Regarding the commenter's first assertion, this rule will not have any negative effect on the ability of law-abiding citizens to acquire firearms. If anything, this rule will benefit licensees or applicants requesting hearings by informing them of their option to submit material that may mitigate or reverse ATF's decision to revoke, suspend, or deny an application for a Federal firearms license. Concerning the commenter's second assertion, strengthening the penalties in § 922(t)(5) for violations of § 922(t)(1) is a matter for Congress, and cannot be addressed by ATF in this rulemaking. The Department notes that the amounts of civil fines and civil penalties as set forth in various Federal statutes are subject to being increased, by regulation, to account for inflation, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, codified as amended at 28 U.S.C. 2461 note. That is a matter to be addressed in a separate rulemaking.

Two commenters expressed concern that the 15-day period in which to file the request for an administrative hearing under 27 CFR 478.72 to review the denial of a license, or under § 478.74 to review the revocation or suspension of a license, or the imposition of a civil fine, is too short. One commenter suggested the response period should be extended to one month from the date the applicant or licensee receives a notice of the denial, revocation, or suspension of a Federal firearms license, or imposition of a civil fine. The second commenter suggested the response period should be extended to 45 days from receipt of such notice. Both commenters argued the additional time would provide licensees and applicants with a more reasonable amount of time to respond to the notice. ATF is unaware of any evidence demonstrating that the 15-day period, which has been in place for many years, is not ample time to request a hearing.[2] Moreover, if sufficient good cause is shown, the Director of Industry Operations may extend the time limit in individual cases pursuant to 27 CFR 478.22(a). Furthermore, the NPRM did not propose to change the 15-day period and the Department does not believe a change in the time period is necessary. However, the issue of notice as it pertains to firearms license administrative hearings may be addressed in a separate rulemaking, if necessary.

One commenter who supported the proposed rule suggested that ATF create a "database that ensures those who get licenses also have a photo that attaches the license and the serial number of that firearm together." Although novel, this suggestion is not responsive to this rulemaking's request for comments regarding administrative hearings for Federal firearms licensees.

One commenter provided four comments regarding the implementation of the proposed rule. First, the commenter argued that the current "informal" hearing is only as informal as it suits ATF Counsel. Second, the commenter argued, "ATF Executives previously attempted at least the appearance of fairness in its administrative licensing proceedings by promulgating and adopting guidelines—known as the Administrative Action Order ('AAO')—which required uniformity in the handling and outcomes of ATF administrative matters, yet the AAO is ignored by ATF Counsel." Third, the commenter argued, "[t]he false confidence generated by a system that 'stacks the deck' for one-sided adjudication in ATF's favor fosters unnecessary hostility with the industry, while obstructing bona fide ATF decision-makers from entertaining or implementing common sense solutions." Finally, the commenter argued, "[n]on-communication among ATF personnel in key positions manifests itself in situations that compromise the entire bureau's integrity and reputation, not just the integrity and reputations of individual or isolated actors, and alienates the regulated environment."

The issues presented by the commenter, while substantive and related to the firearms license administrative hearings process, generally address a separate issue of how cases are adjudicated. First, as will be discussed further below, the Department has decided to remove the word "informal" from the regulatory text of the final rule. Second, ATF procedures are implemented to provide fairness and uniformity to all participants. Furthermore, as noted above, ATF provides a pamphlet on the hearing process with each notice, and has published a public notice of Hearing Procedures Relating to Federal Firearms Licensees, 75 FR 48362, to provide guidance on the process. Third, the regulations do not prevent common-sense solutions, but instead permit parties to make offers of settlement for review and consideration before or after the hearing. The final rule clarifies that offers of settlement will not be entertained at the hearing because the hearing is not a settlement conference but an opportunity to establish the factual record. Fourth, communication between ATF personnel is an integral part of this process, and ATF disagrees with the commenter's assertion that ATF personnel do not communicate with one another.

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[2] The notice does not require that an applicant or licensee submit supporting facts, arguments, or evidence along with the request for a hearing within the 15-day period. Instead, the hearing notice merely requires a response from the applicant or licensee stating the request for an administrative hearing.

One commenter suggested further amendments to the proposed rule by adding and emphasizing the word "informal" in additional sections not amended in the proposed rule, including the second sentence in 27 CFR 478.71 and the section title of § 478.72. As will be discussed further below, however, the Department has decided to remove the word "informal" from the regulatory text of the final rule.

Comments on Specific Sections of the Proposed Rule

Several comments sought additional clarification of or suggested substantive changes to the proposed rule. Four commenters expressed concern that the use of the term "informal" as applied to firearms administrative license proceedings required further clarification. Additionally, one commenter argued that the proposed rule would be contrary to the requirements of the Administrative Procedure Act (APA).

Informal Hearings

As discussed in Section II of this preamble, the NPRM included language proposing to amend the regulations in subpart E of part 478 to clarify that firearms license administrative hearings are informal in nature and that adherence to civil court rules and procedures is consequently not required. *See* 77 FR at 5461. Some of the commenters expressed concern over the use of the term "informal," arguing that it needed further clarification. Some of these commenters asked specifically what rules and procedures would be used in "informal" hearings, as well as whether and how "informal" proceedings would be recorded.

One commenter expressed support for the rule, but expressed the following concerns about the clarity of the term "informal":

> This notice states that the hearings are to be informal in nature, however further clarification is needed here I believe. How informal exactly? Will there be a record of the proceedings in the event that the decision is appealed and how would that be handled? If adherence to civil court rules and procedure is not required, then what type of rules and procedure will be required and implemented? I think there needs to be a little more detailed description of what type of process the person who requests a hearing will go through when the person is submitting their facts and arguments.

Additionally, one commenter who opposed the rule argued, "[t]o suggest that an ATF administrative hearing—as currently constituted—is 'informal' in any way is an unfettered mischaracterization."

As the NPRM explained, the proposed rule would not change any of the procedures or rules that govern the administrative hearings provided for in §§ 478.72 and 478.74, but would merely clarify for the benefit of the licensee or applicant the opportunities afforded to the individual requesting such a hearing. In addition, ATF's published explanation of its hearing procedures already states that "[h]earing procedures in firearms licensing matters are informal in nature." 75 FR at 48363. Nonetheless, it is clear from the response of commenters both supporting and opposing the rule that the proposal to characterize firearms administrative hearings as "informal" in this rule would not provide additional clarification to a licensee or applicant seeking such a hearing, as was the original intent of the proposed rule.

As a result of these comments, and in light of the intent to clarify as expressed in the proposed rule, the Department is modifying the final rule so that it will no longer insert the phrase "the hearing shall be informal" into the regulatory text. So modified, the final rule will inform the licensee or applicant of the option to submit supporting material for consideration during a requested firearms license administrative hearing without stating or implying that the nature of those hearings will otherwise change.

The Administrative Procedure Act

One commenter argued that the inclusion of the term "informal" in the proposed rule is directly contrary to what Congress intended for license hearings under 18 U.S.C. 923(f)(2), and that Congress intended all firearms license proceedings to be subject to the formal adjudication requirements of the APA. The commenter concluded, "[t]he Administrative Procedure Act [under 5 U.S.C. 556(d)] requires that the hearings be formal proceedings where the agency has the burden of proof, where the evidence offered must be reliable, probative, and substantial, and where the applicant may present evidence and conduct cross-examination of the agency's witnesses."

Although the provisions of the APA generally apply to firearms license administrative hearings, ATF disagrees with the conclusion that the APA's formal adjudication provisions are applicable to firearms license administrative proceedings. Under 5 U.S.C. 554(a), the formal adjudication provisions of the APA (sections 554, 556, and 557) apply "in every case of an adjudication required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. 554(a). In order to trigger this requirement, courts have held, a statute generally must state that an agency shall provide a "hearing on the record," rather than just a "hearing." *R.R. Comm'n of Tex.* v. *United States,* 765 F.2d 221, 227 (D.C. Cir. 1985). Moreover, the APA's formal adjudication provisions do not apply "to the extent that there is involved . . . a matter subject to a subsequent trial of the law and the facts *de novo* in a court." 5 U.S.C. 554(a)(1).

The Act does not trigger the formal adjudication provisions of the APA with respect to firearms hearings. The pertinent provisions of the Act require the Attorney General to hold "a hearing," not a hearing "on the record," in connection with the denial, revocation, or suspension of a license, or imposition of a civil fine. *See* 18 U.S.C. 922(t)(5), 923(f)(2), 924(p)(1). Moreover, 18 U.S.C. 923(f)(3) permits an aggrieved party to, at any time within sixty days after the date notice of a decision is given, "file a petition with the United States district court for the district in which he resides or has his principal place of business for a *de novo* judicial review of [a license] denial or revocation." *See also* 27 CFR 478.78 (authorizing a dissatisfied applicant or licensee to "file a petition for judicial review . . . with the U.S. district court for the district in which the applicant or licensee resides or has his principal place of business"). Accordingly, the APA's formal adjudication procedures do not apply to ATF hearings conducted pursuant to 27 CFR 478.72 and 478.74. *See Shaffer* v. *Holder,* No. 1:09–0030, 2010 U.S. Dist. LEXIS 31415, at *10, 2010 WL 1408829, at *14 (M.D. Tenn. Mar. 30, 2010).

The commenter also cites APA procedural requirements contained in 5 U.S.C. 556. However, section 556(a) provides as follows: "This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section." Sections 553 or 554 state that the procedural requirements of section 556 apply to rules and adjudications that are "required by statute to be made [or determined] on the record after opportunity for an agency hearing." As discussed above, the Act does not require firearms licensing hearings to be conducted "on the record."

IV. Final Rule

For the reasons discussed above, this final rule has been revised from the proposed rule to omit any references that characterize hearings concerning the denial, suspension, or revocation of a firearms license, or imposition of a civil fine, as "informal." In addition, the Department is removing the term "or proposals of adjustment" in the final rule. The term "proposals of adjustment" is redundant when used with "offers of settlement" and is therefore unnecessary. The final rule will also clarify that during the hearing the applicant or licensee will have the opportunity to submit facts and arguments for review and consideration. Offers of settlement may be made before or after the hearing, but will not be entertained at the hearing, as the purpose of the hearing is to establish a factual record.

The Department has also revised sections 478.73 and 478.74 to clarify that those sections apply to actions to revoke or suspend a license, or impose a civil fine, under 18 U.S.C. 924(p). This is a technical change that merely reiterates the requirements of the statute, *see* 18 U.S.C. 924(p)(1)(A) (stating that applicants are entitled to "notice and opportunity for hearing" in such actions), and codifies ATF's prior interpretation of sections 478.73 and 478.74, *see* 75 FR at 48362–63.

Statutory and Executive Order Reviews

A. Executive Order 12866 and 13563

This rule has been drafted and reviewed in accordance with Executive Order 12866, "Regulatory Planning and Review," section 1(b), Principles of Regulation, and in accordance with Executive Order 13563, "Improving Regulation and Regulatory Review," section 1, General Principles of Regulation, and section 6, Retrospective Analyses of Existing Rules.

Further, both Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Department has assessed the costs and benefits of this regulation and believes that the regulatory approach selected maximizes net benefits.

This rule will not have an annual effect on the economy of $100 million or more, nor will it adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities. Similarly, it does not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency, materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof, or raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866. Accordingly, this proposed rule is not a "significant regulatory action" as defined by Executive Order 12866.

Section 6 of Executive Order 13563 directs agencies to develop a plan to review existing significant rules that may be "outmoded, ineffective, insufficient, or excessively burdensome," and to make appropriate changes where warranted. The Department selected and reviewed this rule under the criteria set forth in its Plan for Retrospective Analysis of Existing Rules, and determined that this final rule merely clarifies that an applicant or licensee requesting an administrative hearing as a result of the denial, suspension, or revocation of a firearms license, or the imposition of a civil fine, will have the opportunity for the submission and consideration of facts and arguments for review and consideration by the Director, and to make offers of settlement before or after a hearing.

B. Executive Order 13132

This regulation will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, "Federalism," the Attorney General has determined that this regulation does not have sufficient Federalism implications to warrant the preparation of a Federalism summary impact statement.

C. Executive Order 12988

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, "Civil Justice Reform."

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 605(b)) requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. The Attorney General has reviewed this rule and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. The amendments merely clarify that an applicant or licensee requesting an administrative hearing as a result of the denial, suspension, or revocation of a firearms license, or the imposition of a civil fine, will have the opportunity for the submission and consideration of facts and arguments for review and consideration by the Director, and to make offers of settlement before or after a hearing.

E. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

F. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

G. Paperwork Reduction Act

This final rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act.

Disclosure

Copies of the NPRM, all comments received in response to the NPRM, and this final rule will be available for public inspection by appointment during normal business hours at: ATF Reading Room, Room 1E–062, 99 New York Avenue NE., Washington, DC 20226; telephone: (202) 648–8740.

Drafting Information

The author of this document is Shermaine Kenner, Office of Regulatory

Affairs, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives.

List of Subjects in 27 CFR Part 478

Administrative practice and procedure, Arms and munitions, Customs duties and inspection, Exports, Imports, Intergovernmental relations, Law enforcement officers, Military personnel, Penalties, Reporting and recordkeeping requirements, Research, Seizures and forfeitures, and Transportation.

Authority and Issuance

Accordingly, for the reasons discussed in the preamble, 27 CFR part 478 is amended as follows:

PART 478—COMMERCE IN FIREARMS AND AMMUNITION

■ 1. The authority citation for 27 CFR part 478 continues to read as follows:

Authority: 5 U.S.C. 552(a); 18 U.S.C. 847, 921–930; 44 U.S.C. 3504(h).

■ 2. In § 478.72, add a new fifth sentence to read as follows:

§ 478.72 Hearing after application denial.

* * * During the hearing the applicant will have the opportunity to submit facts and arguments for review and consideration; offers of settlement will not be entertained at the hearing but may be made before or after the hearing. * * *

■ 3. In § 478.73, revise the last sentence of paragraph (a) to read as follows:

§ 478.73 Notice of revocation, suspension, or imposition of civil fine.

(a) * * * In addition, pursuant to 18 U.S.C. 922(t)(5) and 18 U.S.C. 924(p), a notice of revocation, suspension, or imposition of a civil fine may be issued on ATF Form 4500 whenever the Director has reason to believe that a licensee has knowingly transferred a firearm to an unlicensed person and knowingly failed to comply with the requirements of 18 U.S.C. 922(t)(1) with respect to the transfer and, at the time that the transferee most recently proposed the transfer, the national instant criminal background check system was operating and information was available to the system demonstrating that the transferee's receipt of a firearm would violate 18 U.S.C. 922(g) or 922(n) or State law; or that a licensee has violated 18 U.S.C. 922(z)(1) by selling, delivering, or transferring any handgun to any person other than a licensee, unless the transferee was provided with a secure gun storage or safety device for that handgun.

* * * * *

■ 4. In § 478.74, revise the fifth and sixth sentences and add a seventh sentence to read as follows:

§ 478.74 Request for hearing after notice of suspension, revocation, or imposition of civil fine.

* * * If the decision is that the license should be revoked, or, in actions under 18 U.S.C. 922(t)(5) or 924(p), that the license should be revoked or suspended, or that a civil fine should be imposed, a certified copy of the summary shall be furnished to the licensee with the final notice of revocation, suspension, or imposition of a civil fine on ATF Form 5300.13. If the decision is that the license should not be revoked, or in actions under 18 U.S.C. 922(t)(5) or 924(p), that the license should not be revoked or suspended, and a civil fine should not be imposed, the licensee shall be notified in writing. During the hearing the licensee will have the opportunity to submit facts and arguments for review and consideration; offers of settlement will not be entertained at the hearing but may be made before or after the hearing.

Dated: May 17, 2016.

Loretta E. Lynch,

Attorney General.

[FR Doc. 2016–12100 Filed 5–20–16; 8:45 am]

BILLING CODE 4410–FY–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R01–OAR–2012–0289; FRL–9946–69–Region 1]

Air Plan Approval; New Hampshire; Ozone Maintenance Plan

AGENCY: Environmental Protection Agency.

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a State Implementation Plan (SIP) revision submitted by the State of New Hampshire that contains an ozone maintenance plan for New Hampshire's former 1-hour ozone nonattainment areas. The Clean Air Act requires that areas that are designated attainment for the 1997 8-hour ozone standard, and also had been previously designated either nonattainment or maintenance for the 1-hour ozone standard, develop a plan showing how the state will maintain the ozone standard for the area. The intended effect of this action is to approve New Hampshire's maintenance plan. This action is being taken in accordance with the Clean Air Act.

DATES: This direct final rule will be effective July 22, 2016, unless EPA receives adverse comments by June 22, 2016. If adverse comments are received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R01–OAR–2012–0289 at *http://www.regulations.gov,* or via email to *arnold.anne@epa.gov.* For comments submitted at *Regulations.gov,* follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* For either manner of submission, the EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Anne Arnold, Air Quality Planning Unit, U.S. Environmental Protection Agency, Suite 100, Mail Code OEP05–02, Boston, MA 02109–3912, telephone number (617) 918–1047, fax number (617) 918–0047, email *arnold.anne@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever "we," "us," or "our" is used, we mean EPA.

Organization of this document. The following outline is provided to aid in locating information in this preamble.

I. What is the background for this action?
II. What action is EPA taking?

III. What is a Section 110(a)(1) maintenance plan?
IV. How has New Hampshire addressed the components of a Section 110(a)(1) maintenance plan?
V. Final Action
VI. Statutory and Executive Order Reviews

I. What is the background for this action?

This action addresses requirements associated with the transition from the 1-hour National Ambient Air Quality Standards (NAAQS) for ground-level ozone to the 1997 8-hour ozone NAAQS.

EPA has established, and periodically reviews and revises, the NAAQS for ground-level ozone. On July 18, 1997 (62 FR 38855), EPA published a final rule for a new 8-hour ozone standard of 0.08 parts per million (ppm). On April 30, 1994 (69 FR 23858), EPA designated and classified areas for the 1997 8-hour ozone NAAQS. Also, on April 30, 2004 (69 FR 23951), EPA published the Phase 1 rule for implementation of the 1997 8-hour ozone NAAQS. Among other requirements, this rule set forth requirements for anti-back sliding purposes for areas designated attainment for the 1997 8-hour ozone standard.

Subsequently, in 2008, and in 2015, EPA again revised the ozone NAAQS to 0.075 ppm and 0.070 ppm, respectively.

II. What action is EPA taking?

EPA is approving a State Implementation Plan (SIP) revision submitted by the State of New Hampshire on March 2, 2012. The SIP revision consists of the Clean Air Act (CAA or Act) section 110(a)(1) ozone maintenance plan for the 1997 8-hour ozone standard for New Hampshire. The maintenance plan demonstrates how the state intends to maintain the 1997 8-hour National Ambient Air Quality Standard for ozone.

The CAA section 110(a)(1) maintenance plan requirement applies to areas that are designated as attainment/unclassifiable for the 1997 8-hour ozone standard and also had a designation of either nonattainment or attainment with an approved maintenance plan for the 1-hour ozone standard as of June 15, 2004, the effective date of the 1997 8-hour ozone standard designation for these areas (See 69 FR 23857). In New Hampshire, this area consists of the cities and towns listed in Table 1.

TABLE 1—1-HOUR OZONE NONATTAINMENT/MAINTENANCE AREAS DESIGNATED UNCLASSIFIABLE/ATTAINMENT FOR THE 8-HOUR STANDARD AS OF JUNE 15, 2004

[= New Hampshire maintenance planning area]

Area	County	Cities and towns included
Boston-Lawrence-Worcester Area.	Hillsborough (part)	Mont Vernon, Wilton.
Manchester Area	Hillsborough (part)	Antrim, Bennington, Deering, Francestown, Greenfield, Greenville, Hancock, Hillsborough, Lyndeborough, Mason, New Boston, New Ipswich, Peterborough, Sharon, Temple, Weare, Windsor.
	Merrimack (part)	Allenstown, Andover, Boscawen, Bow, Bradford, Canterbury, Chichester, Concord, Danbury, Dunbarton, Epsom, Franklin, Henniker, Hill, Hopkinton, Loudon, New London, Newbury, Northfield, Pembroke, Pittsfield, Salisbury, Sutton, Warner, Webster, Wilmot.
Rockingham County	Rockingham (part)	Deerfield, Northwood, Nottingham.
Strafford County	Strafford (part)	Barrington, Farmington, Lee, Madbury, Middleton, Milton, New Durham, Strafford.
Cheshire County	Cheshire (all)	Alstead, Chesterfield, Dublin, Fitzwilliam, Gilsum, Harrisville, Hinsdale, Jaffrey, Keene, Marlborough, Marlow, Nelson, Richmond, Rindge, Roxbury, Stoddard, Sullivan, Surry, Swanzey, Troy, Walpole, Westmoreland, Winchester.

III. What is a Section 110(a)(1) maintenance plan?

Pursuant to section 110(a)(1) of the Clean Air Act, the implementation rule for the 1997 ozone standard requires that areas that were either nonattainment or maintenance areas for the 1-hour ozone NAAQS, but attainment for the 1997 8-hour ozone NAAQS, submit a plan to demonstrate the continued maintenance of the 1997 8-hour ozone NAAQS. EPA established June 15, 2007, three years after the effective date of the initial 1997 8-hour ozone designations, as the deadline for submission of plans for these areas. See 40 CFR 51.905.

On May 20, 2005, EPA issued guidance[1] that applies, in part, to areas that are designated attainment/unclassifiable for the 1997 8-hour ozone standard and either have an approved 1-hour ozone maintenance plan or were designated nonattainment of the 1-hour ozone standard. The purpose of the guidance is to assist the states in the development of a section 110(a)(1) maintenance plan SIP. There are five components of a section 110(a)(1) maintenance plan which are: (1) An attainment inventory, which is based on actual typical summer day emissions of volatile organic compounds (VOCs) and oxides of nitrogen (NO_X) for a ten-year period from a base year as chosen by the state; (2) a maintenance demonstration which shows how the area will remain in compliance with the 1997 8-hour ozone standard for 10 years after the effective date of designations (June 15, 2004); (3) a commitment to continue to operate air quality monitors; (4) a contingency plan that will ensure that a violation of the 1997 8-hour ozone NAAQS is promptly addressed; and (5) an explanation of how the state will track the progress of the maintenance plan.

Subsequently, in the implementation rule for the 2008 ozone NAAQS (80 FR 12264; March 6, 2015), EPA revoked the 1997 8-hour ozone standard. Nevertheless, New Hampshire's March 2, 2012 SIP revision of a Section 110(a)(1) ozone maintenance plan for the 1997 8-hour ozone standard is pending before us, so we are taking action on it at this time.

IV. How has New Hampshire addressed the components of a Section 110(a)(1) maintenance plan?

EPA has determined that the New Hampshire Department of

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[1] "Maintenance Plan Guidance Document for Certain 8-hour Ozone Areas Under Section 110(a)(1) of Clean Air Act," EPA memorandum dated May 20, 2005, from Lydia Wegman to Air Division Directors.

Environmental Services (NHDES) 1997 8-hour ozone maintenance plan addresses all of the necessary components of a Section 110(a)(1) 1997 8-hour ozone maintenance plan as discussed below.

A. Emissions Inventory

An emissions inventory is an itemized list of emission estimates for sources of air pollution in a given area for a specified time period. NHDES has provided a comprehensive emissions inventory for ozone precursors (NO_X and VOCs) in the area. NHDES uses 2002 as the base year from which it projects emissions. The submittal also includes an explanation of the methodology used for determining the anthropogenic emissions (point, area, and mobile sources) in the maintenance area. The inventory is based on emissions for a "typical summer day."

B. Maintenance Demonstration

With regard to demonstrating continued maintenance of the 1997 8-hour ozone standard, NHDES projects that the total emissions from the maintenance area will decrease during the ten-year maintenance period. NHDES has projected emissions from 2002 until 2014. The projected trend in emissions is downward. This clearly demonstrates that the 1997 8-hour ozone standard will be maintained for the ten year period between 2004 and 2014, which is the required test.

Table 2 shows the total VOC and NOx emissions for the maintenance area in New Hampshire for the base year (2002), an interim year (2012), and a final year (2014).[2] More detailed emissions tables can be found in the NHDES submittal. The trend in emissions is downward, for each pollutant in the area. As such, the plan demonstrates that, from an emissions projections standpoint, emissions are projected to decrease.

TABLE 2—2002, 2012, AND 2014 VOC AND NO_X EMISSIONS FOR CHESHIRE, HILLSBOROUGH, MERRIMACK, ROCKINGHAM, AND STRAFFORD COUNTIES

[Pounds per day]

Source category	VOC			NO_X		
	2002	2012	2014	2002	2012	2014
Point	15,898	6,696	7,005	67,347	48,358	50,739
Area	93,778	85,443	91,068	10,516	9,091	9,134
Non-Road Mobile	68,223	40,210	35,121	49,787	36,131	31,215
On-Road Mobile	87,161	36,904	34,245	261,303	75,202	62,347
Total	265,060	169,253	167,439	388,953	168,782	153,435

C. Ambient Monitoring

With regard to the ambient air monitoring component of a maintenance plan, New Hampshire's submittal describes the ozone monitoring network in the maintenance area and New Hampshire commits to the continuing operation of an effective air quality monitoring network to verify the area's attainment status in accordance with the Code of Federal Regulations (CFR), specifically, 40 CFR part 58. New Hampshire's SIP revision was submitted on March 2, 2012 and includes ozone design values[3] for 2010 and 2011 which demonstrate that the maintenance area is meeting the 0.08 ppm 1997 8-hour ozone standard. In addition, based on more recent ozone data from 2014, all of New Hampshire meets the 1997 8-hour ozone standard. Furthermore, preliminary ozone data for 2015 shows that all of New Hampshire continues to meet the 1997 8-hour ozone standard. Table 3 shows the ozone design values for each monitor in the five county area listed in Table 2. As noted in Table 1, portions of these counties make up New Hampshire's maintenance area.

TABLE 3—OZONE DESIGN VALUES (PPM) FOR MONITORS IN THE NEW HAMPSHIRE MAINTENANCE AREA

Monitor location	AQS[4] No.	Design Value	
		2014	2015[5]
Keene	330050007	0.062	0.060
Peterborough	330115001	0.070	0.067
Nashua	330111011	0.066	0.064
Concord	330131007	0.063	0.062
Portsmouth	330150014	0.068	0.066
Rye	330150016	0.068	0.068
Londonderry	330150018	0.067	0.065

D. Contingency Measures

EPA interprets section 110(a)(1) of the CAA to require that the state develop a contingency plan that will ensure that any violation of a NAAQS is promptly corrected. Therefore, as required by section 110(a)(1) of the Act, New Hampshire has listed in its submittal possible contingency measures, as well as a protocol the state will follow, in the event of a future ozone air quality problem. As noted in New Hampshire's

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[2] It should be noted that the emissions shown in this table are for the entire five counties named, rather than the somewhat smaller maintenance area, due to the difficulty of parsing out inventory data to a sub-county basis. This difference is not considered significant, and does not affect the downward trend shown in the emissions.

[3] The design value at an ozone monitor is the 3-year average annual fourth-highest daily maximum 8-hour average ozone concentration measured at that monitor. The design value for an area is the highest design value recorded at any monitor in the area.

[4] AQS is EPA's Air Quality System. States submit ozone monitoring data to AQS.

[5] Ozone design values for 2015 are based on preliminary data.

SIP revision, at the conclusion of each ozone season, NHDES will evaluate whether the design value for any ozone monitor in the maintenance area meets the 1997 8-hour ozone standard. If the design value is above the standard, NHDES will evaluate the potential causes of this design value increase, specifically, whether this increase is due to an increase in local in-state emissions, an increase in upwind out-of-state emissions, or an exceptional event as defined in 40 CFR 50.1. If an increase in in-state emissions is determined to be a contributing factor to the design value increase, NHDES will evaluate the projected in-state emissions for the maintenance area for the ozone season in the following year. If in-state emissions are not expected to satisfactorily decrease in the following ozone season in order to mitigate the violation, New Hampshire will implement one or more of the contingency measures listed in the submittal, or substitute other VOC or NOx control measures to achieve additional in-state emission reductions. The contingency measure(s) will be selected by the Governor, or the Governor's designee, within six months of the end of the ozone season for which contingency measures have been determined necessary. Further details on the types of possible control measures to be used as contingencies can be found in the New Hampshire submittal. New Hampshire's submittal satisfies EPA's contingency measure requirements.

E. Tracking Progress

New Hampshire's SIP revision notes that the State will track the maintenance of attainment by analyzing air quality trends at local monitors and annually updating the state's emissions inventories. NHDES produces comprehensive emission inventories on a three-year cycle and revises the inventories annually using updated emissions data for the largest sources.

Finally, as a practical matter, at this point in time, the 10 year maintenance period (2004–2014) has ended and, as noted by the ozone design values in Table 3 above, the area has maintained the 1997 8-hour ozone standard.

V. Final Action

EPA is approving into the New Hampshire SIP the Clean Air Act Section 110(a)(1) 1997 8-hour ozone maintenance plan for the New Hampshire area that is required to have such a plan. This area includes the cities and towns listed in Table 1 above.

The EPA is publishing this action without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in the proposed rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision should relevant adverse comments be filed. This rule will be effective July 22, 2016 without further notice unless the Agency receives relevant adverse comments by June 22, 2016.

If the EPA receives such comments, then EPA will publish a notice withdrawing the final rule and informing the public that the rule will not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period on the proposed rule. All parties interested in commenting on the proposed rule should do so at this time. If no such comments are received, the public is advised that this rule will be effective on July 22, 2016 and no further action will be taken on the proposed rule. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

VI. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 22, 2016. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: May 4, 2016.

H. Curtis Spalding,

Regional Administrator, EPA New England.

Part 52 of chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart EE—New Hampshire

■ 2. Section 52.1534 is amended by adding paragraph (j) to read as follows:

§ 52.1534 Control strategy: Ozone.

* * * * *

(j) Approval—EPA is approving the Clean Air Act section 110(a)(1) maintenance plan for the 1997 8-hour ozone National Ambient Air Quality Standard in the area of the New Hampshire required to have such a plan. This area includes portions of Hillsborough, Merrimack, Rockingham, and Strafford Counties, and all of Cheshire County. This maintenance plan was submitted to EPA on March 2, 2012.

[FR Doc. 2016–11963 Filed 5–20–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2015–0783; FRL–9946–66–Region 6]

Approval and Promulgation of Implementation Plans; Arkansas; New Mexico; Oklahoma; Disapproval of Greenhouse Gas Biomass Deferral, Step 2 and Minor Source Permitting Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is disapproving severable portions of the February 6, 2012 Oklahoma State Implementation Plan (SIP) submittal that are inconsistent with federal laws based on recent decisions by the United States Courts and subsequent EPA rulemaking. This submittal established Minor New Source Review permitting requirements for greenhouse gas (GHG) emissions and includes Prevention of Significant Deterioration (PSD) permitting provisions for sources that are classified as major, and, thus, required to obtain a PSD permit, based solely on their potential GHG emissions. The PSD permitting provisions also require a PSD permit for modifications of otherwise major sources because they increased only GHG emissions above applicable levels. Additionally, we are disapproving severable portions of SIP submittals for the States of Arkansas, New Mexico, and Oklahoma addressing the EPA's July 20, 2011 rule deferring PSD requirements for carbon dioxide (CO_2) emissions from bioenergy and other biogenic sources ("Biomass Deferral"). We are disapproving the provisions adopting the Biomass Deferral because they are no longer consistent with federal laws and regulations. The EPA is finalizing this disapproval under section 110 and part C of the Clean Air Act (Act or CAA).

DATES: This rule is effective on June 22, 2016.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R06–OAR–2015–0783. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at EPA Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733.

FOR FURTHER INFORMATION CONTACT: Ms. Adina Wiley, (214) 665–2115, *wiley.adina@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, "we," "us," and "our" means the EPA.

I. Background

The background for this action is discussed in detail in our January 11, 2016 proposal. *See* 81 FR 1141. In that document we proposed to disapprove severable portions of the February 6, 2012 Oklahoma SIP submittal establishing GHG permitting requirements for minor sources and for sources that are classified as major, and thus, required to obtain a PSD permit based solely on their potential GHG emissions (referred to as "Step 2" PSD sources in our proposed action) because we determined that these revisions to the Oklahoma SIP establish permitting requirements that are inconsistent with federal laws resulting from recent decisions by United States Courts. We also proposed to disapprove severable portions of the November 6, 2012 Arkansas SIP submittal, the January 8, 2013 New Mexico SIP, and the January 18, 2013 Oklahoma SIP submittal that include the Biomass Deferral in the Arkansas, New Mexico, and Oklahoma PSD programs. Our analysis found that these revisions to the Arkansas, New Mexico, and Oklahoma SIPs should be disapproved because adoption or implementation of these provisions is no longer consistent with federal laws and regulations for PSD permitting.

II. Response to Comments

We received one comment on our proposed action. Our response to the submitted comment is provided below.

Comment: One commenter stated that "not requiring states to continue step two of the permitting for GHG as a major source thus requiring a PSD or Title V permit is the right decisions based on law." Additionally, the commenter stated that "GHG emission issues would be better addressed in it's [*sic*] own statute rather than having the supreme court [*sic*] dictate the regulatory framework of GHG emissions."

Response: We acknowledge the support of the commenter in finding that our proposed disapproval action is consistent with current law. GHG emissions are regulated under the CAA[1] and the CAA includes provisions for citizens, states, and regulated entities to seek judicial review of EPA's final regulatory decisions.[2] Therefore our current action to disapprove the Step 2 permitting requirements is consistent with current law and is consistent with the statutory requirements of the CAA.

III. Final Action

We are taking this final action under section 110 and part C of the Act; as such, we are not imposing sanctions as a result of this disapproval. This final disapproval does not require the EPA to promulgate a Federal Implementation Plan because we are finding that the submitted provisions are inconsistent with federal laws for the regulation and permitting of GHG emissions.

We are disapproving the following severable portions of the February 6, 2012 Oklahoma SIP submittal that establish GHG permitting requirements for minor sources and Step 2 PSD:

- Substantive revisions to the Oklahoma SIP establishing Minor NSR GHG permitting requirements at OAC 252:100–7–2.1 as submitted on February 6, 2012; and
- Substantive revisions to the Oklahoma PSD program in OAC 252:100–8–31 establishing PSD permitting requirements for Step 2 sources at paragraph (E) of the definition of "subject to regulation" as submitted on February 6, 2012.

We are also disapproving as inconsistent with federal laws and regulations for PSD permitting, severable portions of the following SIP submittals that include the Biomass Deferral:

- Substantive revisions to the Arkansas SIP definition of "CO_2 Equivalent Emissions" at Regulation 19, Chapter 2 to implement the Biomass Deferral as submitted on November 6, 2012;
- Substantive revisions to the New Mexico SIP definition of "Subject to Regulation" at 20.2.74.7 (AZ)(2)(*a*) NMAC to implement the Biomass Deferral as submitted on January 8, 2013; and
- Substantive revisions to the Oklahoma SIP definitions of "carbon dioxide equivalent emissions" at OAC 252:100–1–3 and "subject to regulation" at OAC 252:100–8–31 as submitted on January 18, 2013.

As a result of the final disapproval actions listed above, the EPA is also updating the "Approval status" section of the Arkansas SIP at 40 CFR 52.172, New Mexico SIP at 40 CFR 52.1622, and Oklahoma SIP at 40 CFR 52.1922. Additionally, we are renumbering 40 CFR 52.172 of the Arkansas SIP for consistency.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the CAA. We have concluded that the state choices under review in this action do not meet the criteria of the CAA. Accordingly, this action disapproves state law as not meeting Federal requirements for the regulation and permitting of GHG emissions.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA. There is no burden imposed under the PRA because this action disapproves submitted revisions that are no longer consistent with federal laws for the regulation and permitting of GHG emissions.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. This action disapproves submitted revisions that are no longer consistent with federal laws for the regulation and permitting of GHG emissions, and therefore will have no impact on small entities.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector. This action disapproves submitted revisions that are no longer consistent with federal laws for the regulation and permitting of GHG emissions, and therefore will have no impact on small governments.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. This action disapproves provisions of state law that are no longer consistent with federal laws for the regulation and permitting of GHG emissions; there are no requirements or responsibilities added or removed from Indian Tribal Governments. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of "covered regulatory action" in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it disapproves state permitting provisions that are inconsistent with federal laws for the regulation and permitting of GHG emissions.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes the human health or environmental risk addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations. This action is not subject to Executive Order 12898 because it disapproves state permitting provisions that are inconsistent with federal laws for the regulation and permitting of GHG emissions.

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[1] See section 160 of the Act and the Act's implementing regulations at 40 CFR 52.21.

[2] See section 307 of the Act.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 22, 2016. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purpose of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: May 11, 2016.

Ron Curry,

Regional Administrator, Region 6.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart E—Arkansas

■ 2. Section 52.172 is revised to read as follows:

§ 52.172 Approval status.

With the exceptions set forth in this subpart, the Administrator approves Arkansas's state implementation plan under section 110 of the Clean Air Act. Furthermore, the Administrator finds that the plan satisfies all applicable requirements of Parts C and D, Title I, of the Clean Air Act as amended in 1990, except as noted below.

(a) 1997 $PM_{2.5}$ NAAQS: The SIP submitted March 28, 2008 is disapproved for CAA element 110(a)(2)(D)(ii).

(b) 2006 $PM_{2.5}$ NAAQS: The SIPs submitted March 28, 2008 and September 16, 2009 are disapproved for CAA element 110(a)(2)(D)(ii).

(c) GHGs: The revisions to the Arkansas SIP definition of "CO_2 Equivalent Emissions" at Regulation 19, Chapter 2 to implement the GHG Biomass Deferral as submitted on November 6, 2012 are disapproved.

Subpart GG—New Mexico

■ 3. Section 52.1622 is revised to read as follows:

§ 52.1622 Approval status.

With the exceptions set forth in this subpart, the Administrator approves New Mexico's state implementation plan under section 110 of the Clean Air Act. Furthermore, the Administrator finds that the plan satisfies all applicable requirements of Parts C and D, Title I, of the Clean Air Act as amended in 1990, except as noted below.

(a) The revisions to the New Mexico SIP definition of "Subject to Regulation" at 20.2.74.7 (AZ)(2)(*a*) NMAC to implement the GHG Biomass Deferral as submitted on January 8, 2013 are disapproved.

(b) [Reserved]

Subpart LL—Oklahoma

■ 4. Section 52.1922 is revised to read as follows:

§ 52.1922 Approval status.

With the exceptions set forth in this subpart, the Administrator approves Oklahoma's state implementation plan under section 110 of the Clean Air Act. Furthermore, the Administrator finds that the plan satisfies all applicable requirements of Parts C and D, Title I, of the Clean Air Act as amended in 1990, except as noted below.

(a) Revisions to the Oklahoma SIP establishing Minor NSR GHG permitting requirements at OAC 252:100–7–2.1 as submitted on February 6, 2012.

(b) Revisions to the Oklahoma PSD program in OAC 252:100–8–31 establishing PSD permitting requirements for sources that are classified as major and thus required to obtain a PSD permit based solely on their potential GHG emissions ("Step 2 sources") at paragraph (E) of the definition of "subject to regulation" as submitted on February 6, 2012.

(c) Revisions to the Oklahoma SIP definitions of "carbon dioxide equivalent emissions" at OAC 252:100–1–3 and "subject to regulation" at OAC 252:100–8–31 to implement the GHG Biomass Deferral as submitted on January 18, 2013.

[FR Doc. 2016–11965 Filed 5–20–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 82

[EPA–HQ–OAR–2003–0118; FRL–9946–88–OAR]

RIN 2060–AG12

Protection of Stratospheric Ozone: Determination 31 for Significant New Alternatives Policy Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Determination of acceptability.

SUMMARY: This determination of acceptability expands the list of acceptable substitutes pursuant to the U.S. Environmental Protection Agency's (EPA) Significant New Alternatives Policy (SNAP) program. This action lists as acceptable additional substitutes for use in the refrigeration and air conditioning sector.

DATES: This determination is effective on May 23, 2016.

ADDRESSES: EPA established a docket for this action under Docket ID No. EPA–HQ–OAR–2003–0118 (continuation of Air Docket A–91–42). All electronic documents in the docket are listed in the index at *www.regulations.gov.* Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Publicly available docket materials are available either electronically at *www.regulations.gov* or in hard copy at the EPA Air Docket (Nos. A–91–42 and EPA–HQ–OAR–2003–0118), EPA Docket Center (EPA/DC), William J. Clinton West, Room

3334, 1301 Constitution Avenue NW., Washington, DC 20460. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Gerald Wozniak by telephone at (202) 343–9624, by email at *wozniak.gerald@epa.gov*, or by mail at U.S. Environmental Protection Agency, Mail Code 6205T, 1200 Pennsylvania Avenue NW., Washington, DC 20460. Overnight or courier deliveries should be sent to the office location at 1201 Constitution Avenue NW., Washington, DC 20004.

For more information on the Agency's process for administering the SNAP program or criteria for the evaluation of substitutes, refer to the initial SNAP rulemaking published in the **Federal Register** on March 18, 1994 (59 FR 13044). Notices and rulemakings under the SNAP program, as well as other EPA publications on protection of stratospheric ozone, are available at EPA's Ozone Layer Protection Web site at *www.epa.gov/ozone-layer-protection* including the SNAP portion at *www.epa.gov/snap/*.

SUPPLEMENTARY INFORMATION:

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  A. Statutory Requirements and Authority for the SNAP Program
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Appendix A: Summary of Decisions for New Acceptable Substitutes

I. Listing of New Acceptable Substitutes

This action presents EPA's most recent decision to list as acceptable several substitutes in the refrigeration and air conditioning sector. New substitutes are:

- CO_2 in several refrigeration and air conditioning end-uses;
- Hydrofluoroolefin [1] (HFO)-1336mzz(*Z*) in several refrigeration and air conditioning end-uses;
- HFO-1336mzz(*Z*)/*trans*-1,2-dichloroethylene blend (74.7/25.3) (proposed designation R-514A) in two refrigeration and air conditioning end-uses; and
- R-513A in retail food refrigeration—food processing and dispensing equipment.

For copies of the full list of acceptable substitutes for ozone depleting substances (ODS) in all industrial sectors, visit the SNAP portion of EPA's Ozone Layer Protection Web site at *www.epa.gov/snap/substitutes-sector*. Substitutes listed as unacceptable; acceptable, subject to narrowed use limits; or acceptable, subject to use conditions are also listed in the appendices to 40 CFR part 82, subpart G.

The sections below discuss each substitute listing in detail. Appendix A contains tables summarizing today's listing decisions for these new substitutes. The statements in the "Further Information" column in the tables provide additional information, but are not legally binding under section 612 of the Clean Air Act (CAA). In addition, the "Further Information" column may not include a comprehensive list of other legal obligations you may need to meet when using the substitute. Although you are not required to follow recommendations in the "Further Information" column of the table to use a substitute consistent with section 612 of the CAA, some of these statements may refer to obligations that are enforceable or binding under federal or state programs other than the SNAP program. In many instances, the information simply refers to standard operating practices in existing industry standards and/or building codes. When using these substitutes, EPA strongly encourages you to apply the information in this column. Many of these recommendations, if adopted, would not require significant changes to existing operating practices.

You can find submissions to EPA for the substitutes listed in this document, as well as other materials supporting the decisions in this action, in Docket EPA–HQ–OAR–2003–0118 at *www.regulations.gov*.

A. Refrigeration and Air Conditioning

1. Carbon Dioxide (R-744)

EPA's decision: EPA finds carbon dioxide (CO_2) acceptable as a substitute for use in:

- Ice skating rinks (new equipment)
- Centrifugal chillers (new equipment)
- Positive displacement chillers [2] (new equipment)
- Industrial process air conditioning (new equipment)

Carbon dioxide is also known as R-744 when used as a refrigerant. Its Chemical Abstracts Service Registry Number (CAS Reg. No.) is 124–38–9.

You may find the redacted submissions in Docket EPA–HQ–OAR–2003–0118 at *www.regulations.gov* under the names, "SNAP Information Notice for CO_2 (R-744) in Ice Skating Rinks" and "SNAP Information Notice for CO_2 (R-744) in Chillers and Industrial Process Air Conditioning." EPA performed assessments to examine the health and environmental risks of this substitute when used in these end-uses. These assessments are available in Docket EPA–HQ–OAR–2003–0118 under the following names:

- "Risk Screen on Substitutes in Ice Skating Rinks Substitute: Carbon Dioxide (CO_2 or R-744)"
- "Risk Screen on Substitutes in Commercial and Industrial Heat Pumps Substitute: Carbon Dioxide (CO_2 or R-744)"
- "Risk Screen on Substitutes for Use in Chillers and Industrial Process Air-Conditioning Substitute: Carbon Dioxide (CO_2 or R-744)"

EPA previously listed CO_2 as an acceptable refrigerant in a number of other refrigeration and air conditioning end-uses, including industrial process refrigeration, and in the case of motor vehicle air conditioning as acceptable subject to use conditions, (*e.g.*, January 13, 1995, 60 FR 3318; September 30, 2009, 74 FR 50129; June 16, 2010, 75 FR 34017; June 6, 2012, 77 FR 33315; August 10, 2012, 77 FR 47768; October 21, 2014, 79 FR 62863).

Environmental information: CO_2 has an ozone depletion potential (ODP) of zero.[3] The 100-year global warming potential (GWP) of CO_2 is one.[4]

EPA's regulation codified at 40 CFR part 82, subpart F exempts CO_2 refrigerant from the venting prohibition under section 608(c)(2) of the CAA (March 12, 2004, 69 FR 11946).[5] The CAA and EPA's venting regulations prohibit the intentional venting or release of substitutes for class I or class II ODS during the repair, maintenance, service or disposal of refrigeration and air conditioning appliances, unless EPA expressly exempts a particular substitute refrigerant from the venting prohibition, as for CO_2.

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[1] Hydrofluoroolefins are unsaturated hydrofluorocarbons having at least one double bond.

[2] Examples of positive displacement chillers include reciprocating, screw, and scroll chillers. EPA has previously used those terms in acceptability listings for this end-use.

[3] EPA assumes that compounds containing no chlorine, bromine, or iodine have an ODP of zero.

[4] Unless otherwise stated, all GWPs in this document are 100-year values from: IPCC, 2007: *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* [Solomon, S., Qin, D., Manning, M., Chen, Z., Marquis, M., Averyt, K.B., Tignor M., and Miller, H.L. (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA. This document is accessible at *www.ipcc.ch/publications_and_data/ar4/wg1/en/contents.html*.

[5] For more information, including definitions, see 40 CFR part 82 subpart F.

CO_2 is excluded from the definition of volatile organic compounds (VOC) under CAA regulations (see 40 CFR 51.100(s)) addressing the development of state implementation plans (SIPs) to attain and maintain the national ambient air quality standards (NAAQS).

Flammability information: CO_2 is not flammable.

Toxicity and exposure data: Potential health effects of exposure to this substitute at lower concentrations include loss of concentration, headache and shortness of breath. The substitute may also irritate the skin or eyes or cause frostbite. At sufficiently high concentrations, it may cause central nervous system depression. The substitute could cause asphyxiation if air is displaced by vapors in a confined space. For additional information concerning potential health risks of CO_2, see EPA's final rule under the SNAP program for use of CO_2 as a refrigerant in motor vehicle air conditioning systems (June 6, 2012, 77 FR 33315) and EPA's risk screens in docket EPA–HQ–OAR–2003–0118.

To mitigate these potential health risks in the workplace, CO_2 has an 8 hour/day, 40 hour/week permissible exposure limit (PEL) of 5,000 ppm required by the Occupational Safety and Health Administration (OSHA). It also has a 15-minute recommended short-term exposure limit (STEL) of 30,000 ppm established by the National Institute for Occupational Safety and Health (NIOSH). EPA recommends that users follow all requirements and recommendations specified in the manufacturer's safety data sheet (SDS), in the American Society for Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE) Standard 15, and other safety precautions common to the refrigeration and air conditioning industry. We also recommend that users of CO_2 adhere to NIOSH's STEL and to ASHRAE 15, and we expect that users will meet OSHA's PEL. EPA anticipates that users will be able to address potential health risks by complying with the PEL and by following requirements and recommendations in the SDS, in ASHRAE 15, and other safety precautions common in the refrigeration and air conditioning industry.

Comparison to other substitutes in these end-uses: CO_2 has an ODP of zero, comparable[6] to or lower than other substitutes listed as acceptable in these end-uses, with ODPs ranging from zero to 0.098.

In ice skating rinks, many substitutes listed as acceptable have higher GWPs than the GWP of one for CO_2. HFC-134a, R-404A, THR-03 and other HFC blends have GWPs ranging from 920 to 3,990; other substitutes listed as acceptable for ice skating rinks that have a comparable or lower GWP include ammonia absorption and ammonia vapor compression with a GWP of zero.

In centrifugal and positive displacement chillers, most other substitutes listed as acceptable have higher GWPs than CO_2, such as R-450A, R-513A, HFC-134a, R-404A and other HFC blends, with GWPs ranging from approximately 600 to 3,990.[7] CO_2's GWP of one is comparable to or lower than that of several other acceptable substitutes for new equipment within these end-uses including ammonia absorption and ammonia vapor compression, HFO-1234ze(*E*), and for centrifugal chillers only, *trans*-1-chloro-3,3,3,-trifluoroprop-1-ene, with GWPs in the range of zero to seven.

In industrial process air conditioning, most other substitutes listed as acceptable have higher GWPs than CO_2, such as R-513A, R-450A, HFC-134a, R-404A and other HFC blends with GWPs ranging from approximately 600 to 3,990. CO_2's GWP of one is comparable to or lower than several other acceptable substitutes for new equipment in industrial process air conditioning including ammonia absorption and ammonia vapor compression with a GWP of zero and HFO-1234ze(*E*) with a GWP of one to six.

Flammability and toxicity risks of this substitute are comparable to or lower than the flammability and toxicity risks of other available substitutes in the same end-uses. Flammability risks are low, as discussed above. The toxicity risks are similar to those for many other refrigerants and, as with those other refrigerants, can be minimized by use consistent with the OSHA PEL, NIOSH STEL, ASHRAE 15 and other industry standards, recommendations in the SDS, and other safety precautions common in the refrigeration and air conditioning industry.

EPA finds CO_2 acceptable in these end-uses listed above, because the overall environmental and human health risk posed by CO_2 is lower than or comparable to the risks posed by other available substitutes in the same end-uses.

2. HFO-1336mzz(*Z*) (Opteon® MZ)

EPA's decision: EPA finds HFO-1336mzz(Z) acceptable as a substitute for use in:

- Centrifugal chillers (new equipment)
- Positive displacement chillers (new equipment)
- Industrial process air conditioning (new equipment)
- Non-mechanical heat transfer (new and retrofit equipment)

HFO-1336mzz(*Z*) is also known as (*Z*)-1,1,1,4,4,4-hexafluorobut-2-ene and *cis*-1,1,1,4,4,4-hexafluorobut-2-ene (CAS Reg. No. 692–49–9), and goes by the trade name of Opteon® MZ.

You may find the redacted submission in Docket EPA–HQ–OAR–2003–0118 at *www.regulations.gov* under the name, "SNAP Information Notice for Opteon® MZ." EPA performed assessments to examine the health and environmental risks of this substitute in these end-uses. These assessments are available in docket EPA–HQ–OAR–2003–0118 under the following name:

- "Risk Screen on Substitutes for Use in Chillers and Industrial Process Air Conditioning Substitute: HFO-1336mzz(*Z*) (Opteon® MZ)."
- "Risk Screen on Substitutes for Use in Heat Transfer Substitute: HFO-1336mzz(*Z*) (Opteon® MZ)."

We have previously listed HFO-1336mzz(*Z*) as an acceptable foam blowing agent in a number of foam blowing end-uses (October 21, 2014, 79 FR 62863; July 16, 2015, 80 FR 42053).

Environmental information: HFO-1336mzz(*Z*) has an ODP of zero. It has a 100-year GWP of about nine.[8] HFO-1336mzz(*Z*) is a VOC and it is not exempted from the definition of VOC under CAA regulations (see 40 CFR 51.100(s)) addressing the development of SIPs to attain and maintain the NAAQS. The manufacturer has petitioned EPA to exempt HFO-1336mzz(*Z*) from the definition of VOC under those regulations, based on its claim that the chemical exhibits low photochemical reactivity. Knowingly venting or releasing this refrigerant is limited by the venting prohibition under section 608(c)(2) of the CAA, codified at 40 CFR 82.154(a)(1).

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[6] This is in contrast to the historically used ODS hydrochlorofluorocarbon (HCFC)-22 with an ODP of 0.055. Throughout this document, ODP values cited for class I and class II ODS are from EPA's regulations at appendix A to subpart A of 40 CFR part 82.

[7] In a proposed rule published April 18, 2016 (81 FR 22809), EPA proposed to change the status of a number of substitutes from acceptable to unacceptable for use in new centrifugal chillers and in new positive displacement chillers. Those substitutes had GWPs ranging from 920 to 3,990 in both end-uses. If EPA takes final action as proposed, there would still be several substitutes that remain acceptable and that have higher GWPs than CO_2, including HFO-1234ze(*E*), IKON B, R-450A, R-513A, and THR-02 for both end-uses, and for centrifugal chillers also IKON A and *trans*-1-chloro-3,3,3-trifluoroprop-1-ene, with GWPs ranging from approximately 30 to 630.

[8] Baasandorj, M., Ravishankara, A.R., Burkholder, J.B., Atmospheric Chemistry of (*Z*)-CF3CH═CHCF3: OH Radical Reaction Rate Coefficient and Global Warming Potential, *Journal of Physical Chemistry A*, 2011, 115, 10,539–10,549, 2011.

Flammability information: HFO-1336mzz(*Z*) is not flammable.

Toxicity and exposure data: Potential health effects of this substitute include skin or eye irritation or frostbite. At sufficiently high concentrations, the substitute may cause irregular heartbeat. The substitute could cause asphyxiation if air is displaced by vapors in a confined space. EPA issued a Significant New Use Rule under the Toxic Substances Control Act on June 5, 2015, to require persons to submit a Significant New Use Notice to EPA at least 90 days before they manufacture or process HFO-1336mzz(*Z*) for uses other than those described in the Premanufacture Notice (80 FR 32003, 32005).

EPA anticipates that HFO-1336mzz(*Z*) will be used consistent with the recommendations specified in the SDS. The Workplace Environmental Exposure Limit (WEEL) committee of the Occupational Alliance for Risk Science (OARS) recommends a WEEL for the workplace of 500 ppm on an 8-hour time-weighted average (TWA).[9] EPA anticipates that users will be able to meet the WEEL and address potential health risks by following requirements and recommendations in the SDS and other safety precautions common to the refrigeration and air conditioning industry.

Comparison to other substitutes in these end-uses: HFO-1336mzz(*Z*) has an ODP of zero, comparable[10] to or lower than other acceptable substitutes in these end-uses, with ODPs ranging from 0 to 0.02.

In centrifugal and positive displacement chillers, most other substitutes listed as acceptable have higher GWPs than HFO-1336mzz(*Z*), such as R-450A, R-513A, HFC-134a, R-404A and other HFC blends with GWPs ranging from approximately 600 to 3,990.[11] HFO-1336mzz(Z)'s GWP of about nine is comparable to or higher than several other acceptable substitutes for new equipment within these end-uses including ammonia absorption and ammonia vapor compression, HFO-1234ze(*E*), and for centrifugal chillers only, *trans*-1-chloro-3,3,3,-trifluoroprop-1-ene, with GWPs in the range of zero to seven.

In industrial process air conditioning, most other substitutes listed as acceptable have higher GWPs than HFO-1336mzz(*Z*), such as R-513A, R-450A, HFC-134a, R-404A and other HFC blends with GWPs ranging from approximately 600 to 3,990. HFO-1336mzz(*Z*)'s GWP of about nine is comparable to or higher than several other acceptable substitutes for new equipment in industrial process air conditioning including ammonia absorption and ammonia vapor compression with a GWP of zero and HFO-1234ze(*E*) with a GWP of one to six.

In non-mechanical heat transfer, most other substitutes listed as acceptable have higher GWPs such as HFC-245fa, HFC-134a and HFC-125 with GWPs ranging from 1,030 to 3,500. HFO-1336mzz(*Z*)'s GWP of about nine is comparable to or higher than those of several other acceptable substitutes in the same end-use, such as *trans*-1-chloro-3,3,3,-trifluoroprop-1-ene, HFO-1234ze(*E*), CO_2 and ethane, with GWPs in the range of one to seven.

Flammability and toxicity risks of this substitute are comparable to or lower than the flammability and toxicity risks of other available substitutes in the same end-uses. Flammability risks are low, as discussed above. Toxicity risks can be minimized by use consistent with the OARS WEEL, ASHRAE 15 and other industry standards, recommendations in the SDS, and other safety precautions common in the refrigeration and air conditioning industry.

EPA finds HFO-1336mzz(*Z*) acceptable in the end-uses listed above, because the overall environmental and human health risk posed by HFO-1336mzz(*Z*) is lower than or comparable to the risks posed by other available substitutes in the same end-uses.

3. HFO-1336mzz(*Z*)/dichloroethylene blend (74.7/25.3) (Proposed R-514A, Opteon® XP30)

EPA's decision: EPA finds the blend HFO-1336mzz(Z)/trans-1,2-dichloroethylene (74.7/25.3) acceptable as a substitute for use in:

- Centrifugal chillers (new and retrofit equipment)
- Positive-displacement chillers (new and retrofit equipment)

This refrigerant is a weighted blend of 74.7 percent HFO-1336mzz(*Z*) and 25.3 percent *trans*-1,2-dichloroethylene (CAS Reg. No. 156–60–5). ASHRAE has proposed a designation of R-514A for this refrigerant blend. This blend is marketed under the trade name Opteon® XP30.

You may find the redacted submission in Docket EPA–HQ–OAR–2003–0118 at *www.regulations.gov* under the name, "SNAP Information Notice for Opteon® XP30." EPA performed assessments to examine the health and environmental risks of this substitute in this end-use. These assessments are available in docket EPA–HQ–OAR–2003–0118 under the following name:

- "Risk Screen on Substitutes in Chillers Substitute: HFO-1336mzz(*Z*)/*trans*-1,2-dichloroethylene Blend (74.7/25.3) (Opteon® XP30)."

Environmental information: Environmental information on HFO-1336mzz(*Z*) is described above in listing A.2 of this document. *Trans*-1,2-dichloroethylene has an ODP of approximately 0.00024[12] and the blend would have a weighted ODP value of (approximately 0.00006). We are unaware of a calculated GWP value for *trans*-1,2-dichloroethylene in the peer-reviewed literature, but we expect its GWP is less than five based on its structure and its atmospheric lifetime of 12.7 days.[13] The blend is expected to have a weighted 100-year GWP of approximately seven. *Trans*-1,2-dichloroethylene is a VOC and it is not exempted from the definition of VOC under CAA regulations (see 40 CFR 51.100(s)) addressing the development of SIPs to attain and maintain the NAAQS. Knowingly venting or releasing this refrigerant is limited by the venting prohibition under section 608(c)(2) of the CAA, codified at 40 CFR 82.154(a)(1).

Flammability information: Although the *trans*-dichloroethylene component of this blend is flammable, HFO-1336mzz(*Z*) is not flammable, and HFO-1336mzz(*Z*)/*trans*-1,2-dichloroethylene blend (74.7/25.3) as formulated and in the worst-case fractionation formulation is not flammable.

Toxicity and exposure data: Potential health effects of HFO-1336mzz(*Z*)/*trans*-

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[9] The documentation may be viewed at *www.tera.org/OARS/HFO-1336mzz-Z%20WEEL%20FINAL.pdf.*

[10] In contrast, the historically used ODS CFC-11, CFC-12 and HCFC-22 have ODPs ranging from 0.055 to 1.0.

[11] In a proposed rule published April 18, 2016 (81 FR 22809), EPA proposed to change the status of a number of substitutes from acceptable to unacceptable for use in new centrifugal chillers and in new positive displacement chillers. Those substitutes had GWPs ranging from 920 to 3,990 in both end-uses. If EPA takes final action as proposed, there would still be several substitutes that remain acceptable and that have higher GWPs than HFO-1336mzz(*Z*), including IKON B, R-450A, R-513A, and THR-02 for both end-uses, and for centrifugal chillers also IKON A, with GWPs ranging from approximately 30 to 630.

[12] Patten and Wuebbles, 2010. "Atmospheric Lifetimes and Ozone Depletion Potentials of *trans*-1-chloro-3,3,3-trichloropropylene and *trans*-1,2-dichloroethylene in a three-dimensional model." Atmos. Chem. Phys., 10, 10867–10874, 2010.

[13] Patten and Wuebbles, 2010. *Op cit.*

1,2-dichloroethylene blend (74.7/25.3) include skin or eye irritation or frostbite. At sufficiently high concentrations, the substitute may cause irregular heartbeat. The substitute could cause asphyxiation if air is displaced by vapors in a confined space.

EPA anticipates that HFO-1336mzz(*Z*)/*trans*-1,2-dichloroethylene blend (74.7/25.3) will be used consistent with the recommendations specified in the SDS. *Trans*-dichloroethylene has an 8 hour/day, 40 hour/week PEL of 200 ppm required by OSHA. The WEEL committee of OARS recommends a WEEL for the workplace of 500 ppm on an 8-hour TWA for HFO-1336mzz(*Z*).[14] The manufacturer recommends an acceptable exposure limit (AEL) for the blend of 323 ppm on an 8-hour TWA. EPA anticipates that users will be able to meet the PEL, WEEL, and the AEL and address potential health risks by following requirements and recommendations in the SDS and other safety precautions common to the refrigeration and air conditioning industry.

Comparison to other substitutes in these end-uses: HFO-1336mzz(*Z*)/*trans*-1,2-dichloroethylene blend (74.7/25.3) has an ODP of approximately 0.00006, comparable[15] to or lower than other acceptable substitutes in these end-uses, with ODPs ranging from zero to 0.02.

In centrifugal and positive-displacement chillers, most other substitutes listed as acceptable have higher GWPs than HFO-1336mzz(*Z*)/*trans*-1,2-dichloroethylene blend (74.7/25.3), such as R-450A, R-513A, HFC-134a, R-404A and other HFC blends with GWPs ranging from approximately 600 to 3,990.[16] HFO-1336mzz(*Z*)/*trans*-1,2-dichloroethylene blend (74.7/25.3)'s GWP of about seven is comparable to or higher than several other acceptable substitutes for new equipment within these end-uses, including ammonia absorption and ammonia vapor compression, HFO-1234ze(*E*) and, for centrifugal chillers only, *trans*-1-chloro-3,3,3,-trifluoroprop-1-ene, with GWPs in the range of zero to seven.

Flammability and toxicity risks of this substitute are comparable to or lower than the flammability and toxicity risks of other available substitutes in the same end-uses. Flammability risks are low, as discussed above. Toxicity risks can be minimized by use consistent with the OSHA PEL, OARS WEEL, the manufacturer's recommended AEL, ASHRAE 15 and other industry standards, recommendations in the SDS, and other safety precautions common in the refrigeration and air conditioning industry.

EPA finds HFO-1336mzz(*Z*)/*trans*-1,2-dichloroethylene blend (74.7/25.3) acceptable in the end-uses listed above, because the overall environmental and human health risk posed by this substitute is lower than or comparable to the risks posed by other available substitutes in the same end-uses.

4. R-513A

EPA's decision: EPA finds R-513A acceptable as a substitute for use in:

- Retail food refrigeration—refrigerated food processing and dispensing equipment (new and retrofit equipment)

R-513A, marketed under the trade name Opteon® XP10, is a weighted blend of 44 percent HFC-134a, which is also known as 1,1,1,2 tetrafluoroethane (CAS Reg. No. 811–97–2); and 56 percent HFO-1234yf, which is also known as 2,3,3,3-tetrafluoroprop-1-ene (CAS Reg. No. 754–12–1).

You may find the redacted submission in Docket EPA–HQ–OAR–2003–0118 at *www.regulations.gov* under the name, "SNAP Information Notice for Opteon® XP 10." EPA performed assessments to examine the health and environmental risks of this substitute. These assessments are available in Docket EPA–HQ–OAR–2003–0118 under the following name:

- "Risk Screen on Substitutes for Use in Retail Food Refrigeration Substitute: R-513A"

Environmental information: R-513A has an ODP of zero. Its components, HFC-134a and HFO-1234yf, have GWPs of 1,430 and one to four,[17] respectively. If these values are weighted by mass percentage, then R-513A has a GWP of about 630. The components of R-513A are both excluded from the definition of VOC under CAA regulations (see 40 CFR 51.100(s)) addressing the development of SIPs to attain and maintain the NAAQS. Knowingly venting or releasing this refrigerant blend is limited by the venting prohibition under section 608(c)(2) of the CAA, codified at 40 CFR 82.154(a)(1).

Flammability information: R-513A as formulated and in the worst-case fractionation formulation is not flammable.

Toxicity and exposure data: Potential health effects of exposure to this substitute include drowsiness or dizziness. The substitute may also irritate the skin or eyes or cause frostbite. At sufficiently high concentrations, the substitute may cause irregular heartbeat. The substitute could cause asphyxiation if air is displaced by vapors in a confined space.

The AIHA has established WEELs of 1,000 ppm and 500 ppm as an 8-hour TWA for HFC-134a and HFO-1234yf, respectively, the components of R-513A. The manufacturer of R-513A recommends an AEL of 653 ppm on an 8-hour TWA for the blend. EPA anticipates that users will be able to meet each of the AIHA WEELs and the manufacturer's AEL, and address potential health risks by following requirements and recommendations in the SDS, in ASHRAE 15, and other safety precautions common to the refrigeration and air conditioning industry.

Comparison to other substitutes in this end-use: R-513A has an ODP of zero, comparable[18] to or lower than other listed substitutes in this end-use, with ODPs ranging from zero to 0.098.

R-513A's GWP of about 630 is comparable to or lower than most other substitutes in retail food refrigeration—refrigerated food processing and dispensing, including R-450A, HFC-134a, R-404A, R-407C, and a number of HFC blends, with GWPs ranging from approximately 600 to 3,920.[19] R-513A's GWP of about 630 is higher than those of some other acceptable substitutes in new retail food refrigeration—refrigerated food processing and dispensing units, including ammonia vapor compression with a secondary loop and CO_2 with GWPs of zero and one, respectively; these alternatives with lower GWP are not listed as acceptable for use in retrofit equipment.

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[14] The documentation may be viewed at *www.tera.org/OARS/HFO-1336mzz-Z%20WEEL%20FINAL.pdf.*

[15] In contrast, the historically used ODS CFC-11, CFC-12, and HCFC-22 have ODPs ranging from 0.055 to 1.

[16] In a proposed rule published April 18, 2016 (81 FR 22809), EPA proposed to change the status of a number of substitutes from acceptable to unacceptable for use in new centrifugal chillers and in new positive displacement chillers. Those substitutes had GWPs ranging from 920 to 3,990 in both end-uses. If EPA takes final action as proposed, there would still be several substitutes that remain acceptable and that have higher GWPs than HFO-1336mzz(*Z*)/*trans*-1,2-dichloroethylene blend (74.7/25.3), including IKON B, R-450A, R-513A, and THR-02 for both end-uses, and for centrifugal chillers also IKON A, with GWPs ranging from approximately 30 to 630.

[17] Hodnebrog *et al.*, 2013 and Nielsen *et al.*, 2007. *Op. cit.*

[18] This is in contrast to the historically used ODS CFC-12, R-502A, and HCFC-22 with ODPs ranging from 0.055 to 1.0.

[19] In a proposed rule published April 18, 2016 (81 FR 22809), EPA proposed to change the status of a number of substitutes from acceptable to unacceptable for use in new retail food refrigeration—refrigerated food processing and dispensing units. Those substitutes had GWPs ranging from 1,770 to 3,990. If EPA takes final action as proposed, there would still be several substitutes that remain acceptable and that have higher GWPs than R-513A, including FOR12A, FOR12B, HFC-134a, R-426A, RS-24 (2002 formulation), SP34E, THR-02 and THR-03, with GWPs ranging from approximately 920 to 1,510.

Flammability and toxicity risks are comparable to or lower than flammability and toxicity risks of other available substitutes in the same end-use. Flammability risks are low, as discussed above. Toxicity risks can be minimized by use consistent with the AIHA WEELs, ASHRAE 15 and other industry standards, recommendations in the SDS, and other safety precautions common in the refrigeration and air conditioning industry.

EPA finds R-513A acceptable in the end-use listed above, because the overall environmental and human health risk posed by R-513A is lower than or comparable to the risks posed by other available substitutes in the same end-use.

II. Section 612 Program

A. Statutory Requirements and Authority for the SNAP Program

Section 612 of the CAA requires EPA to develop a program for evaluating alternatives to ozone-depleting substances. EPA refers to this program as the Significant New Alternatives Policy (SNAP) program. The major provisions of section 612 are:

1. Rulemaking

Section 612(c) requires EPA to promulgate rules making it unlawful to replace any class I substance (CFC, halon, carbon tetrachloride, methyl chloroform, methyl bromide, hydrobromofluorocarbon, and chlorobromomethane) or class II substance (HCFC) with any substitute that the Administrator determines may present adverse effects to human health or the environment where the Administrator has identified an alternative that (1) reduces the overall risk to human health and the environment, and (2) is currently or potentially available.

2. Listing of Unacceptable/Acceptable Substitutes

Section 612(c) requires EPA to publish a list of the substitutes unacceptable for specific uses and to publish a corresponding list of acceptable alternatives for specific uses. The list of "acceptable" substitutes is found at *www.epa.gov/snap/substitutes-sector* and the lists of "unacceptable," "acceptable subject to use conditions," and "acceptable subject to narrowed use limits" substitutes are found in the appendices to 40 CFR part 82 subpart G.

3. Petition Process

Section 612(d) grants the right to any person to petition EPA to add a substance to, or delete a substance from, the lists published in accordance with section 612(c). The Agency has 90 days to grant or deny a petition. Where the Agency grants the petition, EPA must publish the revised lists within an additional six months.

4. 90-Day Notification

Section 612(e) directs EPA to require any person who produces a chemical substitute for a class I substance to notify the Agency not less than 90 days before new or existing chemicals are introduced into interstate commerce for significant new uses as substitutes for a class I substance. The producer must also provide the Agency with the producer's unpublished health and safety studies on such substitutes.

5. Outreach

Section 612(b)(1) states that the Administrator shall seek to maximize the use of federal research facilities and resources to assist users of class I and II substances in identifying and developing alternatives to the use of such substances in key commercial applications.

6. Clearinghouse

Section 612(b)(4) requires the Agency to set up a public clearinghouse of alternative chemicals, product substitutes, and alternative manufacturing processes that are available for products and manufacturing processes which use class I and II substances.

B. EPA's Regulations Implementing Section 612

On March 18, 1994, EPA published the initial SNAP rule (59 FR 13044) which established the process for administering the SNAP program and issued EPA's first lists identifying acceptable and unacceptable substitutes in the major industrial use sectors (subpart G of 40 CFR part 82). These sectors are the following: Refrigeration and air conditioning; foam blowing; solvents cleaning; fire suppression and explosion protection; sterilants; aerosols; adhesives, coatings and inks; and tobacco expansion. These sectors comprise the principal industrial sectors that historically consumed the largest volumes of ODS.

Section 612 of the CAA requires EPA to list as acceptable those substitutes that do not present a significantly greater risk to human health and the environment as compared with other substitutes that are currently or potentially available.

C. How the Regulations for the SNAP Program Work

Under the SNAP regulations, anyone who plans to market or produce a substitute to replace a class I substance or class II substance in one of the eight major industrial use sectors must provide the Agency with notice and the required health and safety information on the substitute at least 90 days before introducing it into interstate commerce for significant new use as an alternative (40 CFR 82.176(a)). While this requirement typically applies to chemical manufacturers as the entity likely to be planning to introduce the substitute into interstate commerce,[20] it may also apply to importers, formulators, equipment manufacturers, and end users[21] when they are responsible for introducing a substitute into commerce. The 90-day SNAP review process begins once EPA receives the submission and determines that the submission includes complete and adequate data (40 CFR 82.180(a)). The CAA and the SNAP regulations, 40 CFR 82.174(a), prohibit use of a substitute earlier than 90 days after notice has been provided to the agency.

The Agency has identified four possible decision categories for substitute submissions: Acceptable; acceptable subject to use conditions; acceptable subject to narrowed use limits; and unacceptable (40 CFR 82.180(b)).[22] Use conditions and narrowed use limits are both considered "use restrictions" and are explained below. Substitutes that are deemed acceptable without use conditions may be used for all applications within the relevant end-uses within the sector and without limits under SNAP on how they may be used. Substitutes that are acceptable subject to use restrictions may be used only in accordance with those restrictions. Substitutes that are found to be unacceptable may not be used after the date specified in the rulemaking adding such substitute to the list of unacceptable substitutes.[23]

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[20] As defined at 40 CFR 82.104, "interstate commerce" means the distribution or transportation of any product between one state, territory, possession or the District of Columbia, and another state, territory, possession or the District of Columbia, or the sale, use or manufacture of any product in more than one state, territory, possession or District of Columbia. The entry points for which a product is introduced into interstate commerce are the release of a product from the facility in which the product was manufactured, the entry into a warehouse from which the domestic manufacturer releases the product for sale or distribution, and at the site of United States Customs clearance.

[21] As defined at 40 CFR 82.172, "end-use" means processes or classes of specific applications within major industrial sectors where a substitute is used to replace an ODS.

[22] The SNAP regulations also include "pending," referring to submissions for which EPA has not reached a determination, under this provision.

After reviewing a substitute, the Agency may make a determination that a substitute is acceptable only if certain conditions in the way that the substitute is used are met to minimize risks to human health and the environment. EPA describes such substitutes as "acceptable subject to use conditions." Entities that use these substitutes without meeting the associated use conditions are in violation of EPA's SNAP regulations (40 CFR 82.174(c)).

For some substitutes, the Agency may permit a narrowed range of use within an end-use or sector. For example, the Agency may limit the use of a substitute to certain end-uses or specific applications within an industry sector. The Agency generally requires a user of a substitute subject to narrowed use limits to demonstrate that no other acceptable substitutes are available for their specific application.[24] EPA describes these substitutes as "acceptable subject to narrowed use limits." A person using a substitute that is acceptable subject to narrowed use limits in applications and end-uses that are not consistent with the narrowed use limit is using the substitute in violation of section 612 of the CAA and EPA's SNAP regulations (40 CFR 82.174(c)).

The section 612 mandate for EPA to prohibit the use of a substitute that may present risk to human health or the environment where a lower risk alternative is available or potentially available[25] provides EPA with the authority to change the listing status of a particular substitute if such a change is justified by new information or changed circumstance.

As described in this document and elsewhere, including the initial SNAP rule published in the **Federal Register** at 59 FR 13044 on March 18, 1994, the SNAP program evaluates substitutes within a comparative risk framework. The SNAP program compares new substitutes both to the ozone-depleting substances being phased out under the *Montreal Protocol on Substances that Deplete the Ozone Layer* and the CAA, and to other available or potentially available alternatives for the same end-uses. The environmental and health risk factors that the SNAP program considers include ozone depletion potential, flammability, toxicity, occupational and consumer health and safety, as well as contributions to global warming and other environmental factors. Environmental and human health exposures can vary significantly depending on the particular application of a substitute—and over time, information applicable to a substitute can change. This approach does not imply fundamental tradeoffs with respect to different types of risk, either to the environment or to human health. Over the past twenty years, the menu of substitutes has become much broader and a great deal of new information has been developed on many substitutes. Because the overall goal of the SNAP program is to ensure that substitutes listed as acceptable do not pose significantly greater risk to human health and the environment than other available substitutes, the SNAP criteria should be informed by our current overall understanding of environmental and human health impacts and our experience with and current knowledge about available and potentially available substitutes. Over time, the range of substitutes reviewed by SNAP has changed, and, at the same time, scientific approaches have evolved to more accurately assess the potential environmental and human health impacts of these chemicals and alternative technologies. The Agency publishes its SNAP program decisions in the **Federal Register**. EPA uses notice-and-comment rulemaking to place any alternative on the list of prohibited substitutes, to list a substitute as acceptable only subject to use conditions or narrowed use limits, or to remove a substitute from either the list of prohibited or acceptable substitutes.

In contrast, EPA publishes "notices of acceptability" or "determinations of acceptability," to notify the public of substitutes that are deemed acceptable with no restrictions. As described in the preamble to the rule initially implementing the SNAP program (59 FR 13044; March 18, 1994), EPA does not believe that rulemaking procedures are necessary to list alternatives that are acceptable without restrictions because such listings neither impose any sanction nor prevent anyone from using a substitute.

Many SNAP listings include "comments" or "further information" to provide additional information on substitutes. Since this additional information is not part of the regulatory decision, these statements are not binding for use of the substitute under the SNAP program. However, regulatory requirements so listed are binding under other regulatory programs (*e.g.*, worker protection regulations promulgated by OSHA). The "further information" classification does not necessarily include all other legal obligations pertaining to the use of the substitute. While the items listed are not legally binding under the SNAP program, EPA encourages users of substitutes to apply all statements in the "further information" column in their use of these substitutes. In many instances, the information simply refers to sound operating practices that have already been identified in existing industry and/or building codes or standards. Thus many of the statements, if adopted, would not require the affected user to make significant changes in existing operating practices.

D. Additional Information about the SNAP Program

For copies of the comprehensive SNAP lists of substitutes or additional information on SNAP, refer to EPA's Ozone Depletion Web site at: *www.epa.gov/snap*. For more information on the agency's process for administering the SNAP program or criteria for evaluation of substitutes, refer to the initial SNAP rulemaking published March 18, 1994 (59 FR 13044), codified at 40 CFR part 82, subpart G. SNAP decisions and the appropriate **Federal Register** citations are found at: *www.epa.gov/snap/snap-regulations.*

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[23] As defined at 40 CFR 82.172, "use" means any use of a substitute for a Class I or Class II ozone-depleting compound, including but not limited to use in a manufacturing process or product, in consumption by the end-user, or in intermediate uses, such as formulation or packaging for other subsequent uses. This definition of use encompasses manufacturing process of products both for domestic use and for export. Substitutes manufactured within the United States exclusively for export are subject to SNAP requirements since the definition of use in the rule includes use in the manufacturing process, which occurs within the United States.

[24] In the case of the July 20, 2015, final rule, EPA established narrowed use limits for certain substitutes over a limited period of time for specific MVAC and foam applications, on the basis that other acceptable alternatives would not be available for those specific applications within broader end-uses, but acceptable alternatives were expected to become available over time, *e.g.*, after military qualification testing for foam blowing agents in military applications or after development of improved servicing infrastructure in a destination country for MVAC in vehicles destined for export.

[25] In addition to acceptable commercially available substitutes, the SNAP program may consider potentially available substitutes. The SNAP program's definition of "potentially available" is "any alternative for which adequate health, safety, and environmental data, as required for the SNAP notification process, exist to make a determination of acceptability, and which the agency reasonably believes to be technically feasible, even if not all testing has yet been completed and the alternative is not yet produced or sold." (40 CFR 82.172).

List of Subjects in 40 CFR Part 82

Environmental protection, Administrative practice and procedure, Air pollution control, Reporting and recordkeeping requirements.

Dated: May 17, 2016.

Sarah Dunham,

Director, Office of Atmospheric Programs.

Appendix A: Summary of Decisions for New Acceptable Substitutes

REFRIGERATION AND AIR CONDITIONING

End-use	Substitute	Decision	Further information[1]
Centrifugal chillers *(new only)* ...	Carbon dioxide (CO_2 or R-744)	Acceptable	CO_2 has no ozone depletion potential (ODP) and a global warming potential (GWP) of 1. The Occupational Safety and Health Administration (OSHA) has established a required 8-hour (8-hr) time-weighted average (TWA) permissible exposure limit (PEL) for CO_2 of 5,000 ppm. The National Institute for Occupational Safety and Health (NIOSH) has established a 15-minute recommended short-term exposure limit (STEL) of 30,000 ppm. CO_2 is nonflammable. EPA recommends that users follow all requirements and recommendations specified in American Society for Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) standard 15.
	HFO-1336mzz(*Z*) ((*Z*)-1,1,1,4,4,4-hexafluorobut-2-ene).	Acceptable	HFO-1336mzz(*Z*) (CAS Reg. No. 692–49–9) has no ODP and a 100-year GWP of roughly 9. This compound is nonflammable. The Occupational Alliance for Risk Science (OARS) recommends a Workplace Environmental Exposure Limit (WEEL) of 500 ppm (8-hr TWA) for HFO-1336mzz(*Z*).
Centrifugal chillers *(new and retrofit equipment).*	HFO-1336mzz(*Z*)/*trans*-1,2-dichloroethylene blend (74.7/25.3) (proposed R-514A).	Acceptable	HFO-1336mzz(*Z*)/*trans*-1,2-dichloroethylene blend (74.7/25.3) has an ODP value of approximately 0.00006 and an estimated 100-year GWP of approximately 7. This substitute is a blend of 74.7 percent HFO-1336mzz(*Z*), also known as (*Z*)-1,1,1,4,4,4-hexafluoro-but-2-ene and *cis*-1,1,1,4,4,4-hexafluorobut-2-ene (CAS Reg. No. 692–49–9), and 25.3 percent *trans*-1,2-dichloroethylene (CAS Reg. No. 156–60–5). The blend is nonflammable. OSHA has established an 8-hr TWA PEL of 200 ppm for *trans*-dichloroethylene. OARS recommends a WEEL of 500 ppm (8-hr TWA) for HFO-1336mzz(*Z*). The manufacturer recommends an acceptable exposure limit (AEL) for the workplace for HFO-1336mzz(*Z*)/*trans*-1,2-dichloroethylene blend (74.7/25.3) of 323 ppm (8-hr TWA).
Heat transfer *(new and retrofit equipment).*	HFO-1336mzz(*Z*) ((*Z*)-1,1,1,4,4,4-hexafluorobut-2-ene).	Acceptable	HFO-1336mzz(*Z*) (CAS Reg. No. 692–49–9) has no ODP and a 100-year GWP of roughly 9. This compound is nonflammable. OARS recommends a WEEL of 500 ppm (8-hr TWA) for HFO-1336mzz(*Z*).
Ice skating rinks *(new only)*	Carbon dioxide (CO_2 or R-744)	Acceptable	CO_2 has no ODP and a GWP of 1. OSHA has established an 8-hr TWA PEL for CO_2 of 5,000 ppm. NIOSH has established a 15-minute TWA recommended STEL of 30,000 ppm. CO_2 is nonflammable. EPA recommends that users follow all requirements and recommendations specified in ASHRAE standard 15.
Industrial process air conditioning *(new only).*	Carbon dioxide (CO_2 or R-744)	Acceptable	CO_2 has no ODP and a GWP of 1. OSHA has established an 8-hr TWA PEL for CO_2 of 5,000 ppm. NIOSH has established a 15-minute TWA recommended STEL of 30,000 ppm. CO_2 is nonflammable. EPA recommends that users follow all requirements and recommendations specified in ASHRAE standard 15.
	HFO-1336mzz(*Z*) ((*Z*)-1,1,1,4,4,4-hexafluorobut-2-ene).	Acceptable	HFO-1336mzz(*Z*) (CAS Reg. No. 692–49–9) has no ODP and a 100-year GWP of roughly 9. This compound is nonflammable. OARS recommends a WEEL of 500 ppm (8-hr TWA) for HFO-1336mzz(*Z*).
Positive displacement chillers *(new only).*	Carbon dioxide (CO_2 or R-744)	Acceptable	CO_2 has no ODP and a GWP of 1.

REFRIGERATION AND AIR CONDITIONING—Continued

End-use	Substitute	Decision	Further information[1]
			OSHA has established an 8-hr TWA PEL for CO_2 of 5,000 ppm. NIOSH has established a 15-minute TWA recommended STEL of 30,000 ppm. CO_2 is nonflammable. EPA recommends that users follow all requirements and recommendations specified in ASHRAE standard 15.
	HFO-1336mzz(*Z*) ((*Z*)-1,1,1,4,4,4-hexafluorobut-2-ene).	Acceptable	HFO-1336mzz(*Z*) (CAS Reg. No. 692–49–9) has no ODP and a 100-year GWP of roughly 9. This compound is nonflammable. OARS recommends a WEEL of 500 ppm (8-hr TWA) for HFO-1336mzz(*Z*).
Positive displacement chillers *(new and retrofit equipment).*	HFO-1336mzz(*Z*)/*trans*-1,2-dichloroethylene blend (74.7/25.3) (proposed R-514A).	Acceptable	HFO-1336mzz(*Z*)/*trans*-1,2-dichloroethylene blend (74.7/25.3) has an ODP value of approximately 0.00006 and an estimated 100-year GWP of approximately 7. This substitute is a blend of 74.7 percent HFO-1336mzz(*Z*), also known as (*Z*)-1,1,1,4,4,4-hexafluoro-but-2-ene and *cis*-1,1,1,4,4,4-hexafluorobut-2-ene (CAS Reg. No. 692–49–9), and 25.3 percent *trans*-1,2-dichloroethylene (CAS Reg. No. 156–60–5). The blend is nonflammable. OSHA has established an 8-hr TWA PEL of 200 ppm for *trans*-dichloroethylene. OARS recommends a WEEL of 500 ppm (8-hr TWA) for HFO-1336mzz(*Z*). The manufacturer recommends an AEL for the workplace for the HFO-1336mzz(*Z*)/*trans*-1,2-dichloroethylene blend (74.7/25.3) of 323 ppm (8-hr TWA).
Retail food refrigeration *(new and retrofit refrigerated food processing and dispensing equipment).*	R-513A	Acceptable	R-513A has no ODP and a 100-year GWP of approximately 630. This substitute is a blend of HFC-134a, which is also known as 1,1,1,2-tetrafluoroethane (CAS Reg. No. 811–97–2); and HFO-1234yf, which is also known as 2,3,3,3-tetrafluoroprop-l-ene (CAS Reg. No. 754–12–1). This blend is nonflammable. The AIHA has established WEELs of 1,000 ppm and 500 ppm (8-hr TWA) for HFC-134a and HFO-1234yf, respectively. The manufacturer recommends an AEL for the workplace for R-513A of 653 ppm (8-hr TWA).

[1] Observe recommendations in the manufacturer's SDS and guidance for all listed refrigerants.

[FR Doc. 2016–12117 Filed 5–20–16; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 150303208–6394–02]

RIN 0648–BE70

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Fishery Off the Southern Atlantic States; Amendment 35

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues regulations to implement Amendment 35 to the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP) (Amendment 35), as prepared and submitted by the South Atlantic Fishery Management Council (Council). Amendment 35 and this final rule removes black snapper, mahogany snapper, dog snapper, and schoolmaster from the FMP and the regulations, and revises regulations regarding the golden tilefish longline endorsement program. The purpose of this final rule is to ensure that only snapper-grouper species requiring Federal management are included in the Snapper-Grouper FMP, improve the consistency of management of snapper-grouper species in waters off south Florida across state and Federal jurisdictional boundaries, and to align regulations for golden tilefish longline endorsements with the Council's original intent for establishing the longline endorsement program.

DATES: This final rule is effective June 22, 2016.

ADDRESSES: Electronic copies of Amendment 35 may be obtained from the Southeast Regional Office Web site at *http://sero.nmfs.noaa.gov.* Amendment 35 includes a draft environmental assessment, a Regulatory Flexibility Act (RFA) analysis, a regulatory impact review, and a Fishery Impact Statement.

FOR FURTHER INFORMATION CONTACT: Nikhil Mehta, telephone: 727–824–5305; email: *nikhil.mehta@noaa.gov.*

SUPPLEMENTARY INFORMATION: The snapper-grouper fishery of the South Atlantic is managed under the FMP, and includes black snapper, mahogany snapper, dog snapper, schoolmaster, and golden tilefish. The FMP was prepared by the Council and is implemented through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

On February 5, 2016, NMFS published a notice of availability for Amendment 35 and requested public comment (81 FR 6222). On March 4, 2016, NMFS published a proposed rule for Amendment 35 and requested public comment (81 FR 11502). The Secretary of Commerce approved Amendment 35 on May 4, 2016. The proposed rule and Amendment 35 outline the rationale for the actions contained in this final rule. A summary of the actions implemented by Amendment 35 and this final rule is provided below.

Management Measures Contained in This Final Rule

Amendment 35 and this final rule removes black snapper, mahogany snapper, dog snapper, and schoolmaster from the FMP and the regulations, and revises the golden tilefish longline endorsement regulations to be consistent with the Council's original intent for establishing the longline endorsement program.

Remove Four Species From the FMP

The Council determined in Amendment 35 that black snapper, mahogany snapper, dog snapper, and schoolmaster should be removed from the FMP, to ensure that only species requiring Federal management are included in the FMP. While these species are currently in the FMP, they have extremely low commercial landings in state and Federal waters, and almost all harvest (recreational and commercial) occurs in waters off the coast of South Florida. Currently, NMFS does not manage these species in Federal waters of the Gulf of Mexico (Gulf); however, the species are subject to regulations in Florida state waters. As described in Amendment 35, there are currently different regulations for recreational bag limits, size limits, and catch levels for these species in South Atlantic Federal waters and Florida state waters. Inconsistent regulations make enforcement difficult and can be confusing to the public. Amendment 35 and this final rule removes black snapper, mahogany snapper, dog snapper, and schoolmaster from the FMP and the regulations and NMFS will not manage these species in Federal waters of the South Atlantic. At its April 2016 meeting, the Florida Fish and Wildlife Conservation Commission approved extending state regulation of these species into Federal waters off Florida for Florida-state registered fishing vessels, consistent with section 306(a)(3)(A) of the Magnuson-Stevens Act, to provide consistent regulations for these species across state and Federal jurisdictional boundaries.

Black snapper is part of the deep-water complex within the FMP. The deep-water complex currently includes black snapper, yellowedge grouper, silk snapper, misty grouper, queen snapper, sand tilefish, and blackfin snapper. With black snapper removed from the FMP, the annual catch limit (ACL) for the deep-water complex is reduced from 170,278 lb (77,237 kg), round weight, to 169,896 lb (77,063 kg), round weight, a difference of 382 lb (173 kg), round weight.

Dog snapper and mahogany snapper are part of the other snappers complex within the FMP. The other snappers complex currently includes cubera snapper, gray snapper, lane snapper, dog snapper, and mahogany snapper. Removal of dog snapper and mahogany snapper from the FMP reduces the other snappers complex ACL from 1,517,716 lb (688,424 kg), round weight, to 1,513,883 lb (686,688 kg), round weight, a difference of 3,833 lb (1,739 kg), round weight.

Schoolmaster is currently designated as an ecosystem component (EC) species in the FMP. The Council chose not to retain dog snapper, mahogany snapper, and black snapper in the FMP as EC species because the objective of the amendment is to establish a consistent regulatory environment across jurisdictional boundaries in Gulf and South Atlantic Federal waters and Florida state waters. Because NMFS does not manage these species in Gulf Federal waters, the Council determined that retaining them as EC species would continue inconsistent regulations across jurisdictional boundaries. Additionally, if these species were designated as EC species, the state of Florida would not be able to extend their management authority for these species into Federal waters, because states may not generally manage species in Federal waters if those species are included in Federal fishery management plans, as per section 306(a)(3)(A) of the Magnuson-Stevens Act.

Removing these species from the FMP and the regulations is not expected to result in any adverse biological effects.

Clarify Regulations for Golden Tilefish Endorsement Holders

The final rule to implement Amendment 18B to the FMP (78 FR 23858, April 23, 2013) established a longline endorsement program for the commercial golden tilefish component of the snapper-grouper fishery. A longline endorsement is required to fish for golden tilefish with longline gear. Amendment 18B also established a golden tilefish hook-and-line quota and modified the golden tilefish commercial trip limits. The Council established the longline endorsement program and gear specific commercial quotas to help ensure that fishermen fishing with each gear type have a fair and equitable allocation of the commercial quota. The Council did not intend for longline endorsement holders to fish on the hook-and-line quota, or for non-endorsement holders to fish on the longline quota.

The Council and NMFS are aware that since Amendment 18B was implemented, some longline endorsement holders are transferring their golden tilefish longline endorsement to another vessel and then fishing for golden tilefish using hook-and-line gear under the hook-and-line quota. Other endorsement holders are renewing their Federal commercial snapper-grouper vessel permit but are waiting to renew their golden tilefish longline endorsement, so that they are able to fish for golden tilefish using hook-and-line gear under the hook-and-line quota while their longline endorsement is not valid. Neither scenario is consistent with the original intent of the Council in Amendment 18B. The Council decided to clarify their intent for golden tilefish longline endorsement holders in Amendment 35. Currently, as described at § 622.191(a)(2)(ii), the regulations state that "Vessels with a golden tilefish longline endorsement are not eligible to fish for golden tilefish using hook-and-line gear under this 500-lb (227-kg), gutted weight, trip limit." This final rule revises the regulations to state that "Vessels that have valid or renewable golden tilefish longline endorsements anytime during the fishing year, are not eligible to fish for golden tilefish using hook-and-line gear under this 500-lb (227-kg), gutted weight, trip limit." Thus, a fisherman who owns a vessel with a valid or renewable golden tilefish longline endorsement would not be eligible to fish for golden tilefish using hook-and-line gear under the 500-lb (227-kg), gutted weight, hook-and-line trip limit during that fishing year.

Additional Change to Codified Text

In the part 622 regulations, NMFS would revise "allowable biological catch" to read "acceptable biological catch" wherever it occurs. In the part 600 regulations, "ABC" is defined as "acceptable biological catch;" however, in the part 622 regulations, "ABC" is defined as "acceptable biological catch" in three places and "allowable biological catch" in four places. NMFS has determined that "acceptable biological catch" is the more precise definition for "ABC". Therefore, to be consistent with the part 600 regulations and to use the more precise terminology, NMFS changes the definition of "ABC" to "acceptable biological catch," and accordingly revise "allowable biological catch," wherever it occurs in the part 622 regulations.

Comments and Responses

A total of 11 comments were received on the proposed rule and Amendment 35 from individuals, a recreational fishing organization, the state of Florida, and a Federal agency. One individual and the state of Florida supported the removal of the four species from the Snapper-Grouper FMP. Two comments were not related to the actions in the Amendment 35. The Federal agency stated that it had no comment on the proposed rule or Amendment 35. The remaining comments that specifically relate to the actions contained in the amendment and the rule as well as NMFS' respective responses, are summarized below.

Comment 1: NMFS should wait for stock assessments for black snapper, mahogany snapper, dog snapper, and schoolmaster, before removing these species from the FMP.

Response: NMFS disagrees that it is necessary to complete stock assessments before removing these species from the FMP. Although a stock assessment has not been performed for any of these species, there is no indication that these stocks are depleted. Black snapper, mahogany snapper, dog snapper, and schoolmaster are currently in the FMP, but have extremely low landings in state and Federal waters, and almost all harvest (recreational and commercial) occurs in waters off south Florida. While NMFS does not manage these species in the Federal waters of the Gulf, these species are subject to regulations in Florida state waters in both the Gulf and South Atlantic. Further, as anticipated in Amendment 35 and the state of Florida's comment on the proposed rule, the Florida Fish and Wildlife Conservation Commission has approved extending state regulations for these species for Florida-state registered vessels into Federal waters of the South Atlantic and Gulf off Florida. Based on these factors, the Council and NMFS determined that removing these species from the FMP is not expected to result in any adverse biological effects. Further, the Council has the ability to add these species back into the FMP at any time, if such an action is warranted in the future.

Comment 2: NMFS should allow a fisher to continue fishing for golden tilefish using hook-and-line gear once the commercial quota for the longline gear component is met, because the golden tilefish portion of the snapper-grouper fishery has separate commercial quotas for both hook-and-line and longline gear. It is discriminatory and unfair not to allow fishers with longline endorsements to fish under the hook-and-line quota.

Response: NMFS disagrees. Amendment 35 clarifies the intent of the Council in Amendment 18B to the FMP (78 FR 23858, April 23, 2013), which established a golden tilefish longline endorsement program. Amendment 18B also established golden tilefish commercial quotas for both the hook-and-line and longline components and revised the golden tilefish commercial trip limits. As explained in Amendment 35, the golden tilefish longline endorsement, separate quotas by gear type, and trip limits, were established because the golden tilefish commercial ACL was being harvested so rapidly by fishermen using longline gear, that fishermen who had historically used hook-and-line gear to target golden tilefish were not able to participate in the golden tilefish portion of the snapper-grouper fishery as a result of the commercial ACL being met early in the fishing year through primarily longline effort. The Council established the longline endorsement program and gear-specific commercial quotas to help ensure that fishermen using each gear type have a fair and equitable allocation of the commercial quota. In Amendment 18B, the Council determined that allocating 75 percent of the overall commercial ACL to longline gear (endorsement holders) and 25 percent of the commercial ACL to hook-and-line gear resulted in a fair and equitable distribution of the golden tilefish resource in the South Atlantic. The separate quota for longline gear is greater than the quota for hook-and-line gear because longline gear can harvest more fish than hook-and-line gear can per commercial trip. When establishing gear-specific quotas, the Council never intended for longline endorsement holders to harvest golden tilefish under the hook-and-line quota, or for non-endorsement holders (hook-and-line) to fish under the longline quota.

However, the Council and NMFS are aware that since Amendment 18B was implemented, some longline endorsement holders have been transferring their golden tilefish longline endorsement to another vessel and then fishing for golden tilefish using hook-and-line gear under the hook-and-line quota. Other endorsement holders are renewing their Federal commercial snapper-grouper vessel permit but are waiting to renew their golden tilefish longline endorsement, thereby fishing for golden tilefish using hook-and-line gear under the hook-and-line quota while their longline endorsement is not valid. Neither scenario is consistent with the original intent of the Council in Amendment 18B. Through Amendment 35, the Council clarified and reaffirmed their intent for the golden tilefish longline endorsement program in the snapper-grouper fishery, to ensure that fishermen using both gear types can participate in harvesting the golden tilefish resource.

Comment 3: Revision of the golden tilefish longline endorsement regulations will create an economic hardship for the current 22 golden tilefish longline endorsement holders.

Response: NMFS acknowledges that there may be potential negative economic effects to the 22 longline endorsement holders, as further discussed in the Classification section to this final rule. The Council considered these effects in Amendment 18B and Amendment 35, and NMFS has determined that the actions in Amendment 35 are consistent with the National Standards in the Magnuson-Stevens Act. In Amendment 18B, the Council considered the negative effects to longline vessels resulting from the allocation of the golden tilefish commercial ACL between longline endorsement holders and those without longline endorsements. Since the implementation of Amendment 18B, and contrary to the original intent of the Council, some longline endorsement holders have received economic benefits by harvesting golden tilefish under the hook-and-line quota, in addition to harvesting under the longline quota. Amendment 35 and this final rule will remove these unanticipated economic benefits.

If a commercial fishermen with a longline endorsement wishes to continue fishing for golden tilefish under the hook-and-line commercial trip limit during a specific fishing year after the effective date of this final rule, they would need to do so on a different vessel with a different commercial snapper-grouper permit. This is consistent with the Council's original intent in Amendment 18B, which was reaffirmed by the Council in Amendment 35. NMFS notes that it would likely not be economically feasible to purchase a new vessel and permit for the sole purpose of harvesting golden tilefish under the hook-and-line trip limit; however, NMFS assumes commercial fishers will only purchase new assets if they expect to result in a profit. Therefore, the negative economic effects of this final rule are limited in scope to a potential reduction in golden tilefish revenue for the 22 longline endorsement holders, most of whom did not harvest golden tilefish under both the longline and hook-and-line quotas on a single vessel in 2014.

Comment 4: Changing the golden tilefish endorsement regulations will limit the availability of golden tilefish. It is important to have golden tilefish available to local restaurants and seafood dealers during the January through March grouper spawning season closure.

Response: If the harvest of golden tilefish is closed to longline endorsement holders during a fishing year as a result of reaching the longline quota, golden tilefish could still be available to seafood restaurants and dealers through fishers who harvest golden tilefish under the hook-and-line quota. Furthermore, during the January through March spawning season closure that is in place for most grouper species, other species such as blueline tilefish, snowy grouper, black sea bass, greater amberjack, and vermilion snapper could still be available to seafood restaurants and dealers when the longline quota for golden tilefish had been met.

Classification

The Regional Administrator, Southeast Region, NMFS, has determined that this final rule is consistent with Amendment 35, the FMP, the Magnuson-Stevens Act, and other applicable laws.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

The Magnuson-Stevens Act provides the statutory basis for this rule. The proposed rule and the preamble to this final rule provide a statement of the need for and objectives of this rule. No duplicative, overlapping, or conflicting Federal rules have been identified. In addition, no new reporting, record-keeping, or other compliance requirements are introduced by this final rule.

In compliance with section 604 of the RFA, NMFS prepared a final regulatory flexibility analysis (FRFA) for this final rule. The FRFA follows.

Public comments relating to socio-economic implications and potential impacts on small businesses are addressed in the responses to comments 2, 3, and 4 in the Comments and Responses section of this final rule. No changes to this final rule were made in response to public comments. No comments were received from the Office of Advocacy for the Small Business Administration.

NMFS agrees that the Council's choice of preferred alternatives will best achieve the Council's objectives for Amendment 35 while minimizing, to the extent practicable, the adverse effects on fishers, support industries, and associated communities.

This final rule will directly affect all commercial vessels that harvest black snapper, dog snapper, mahogany snapper, schoolmaster and/or golden tilefish under the FMP. The removal of the four snapper-grouper species discussed in this final rule will not directly apply to or affect charter vessel and headboat (for-hire) businesses. Any impact to the profitability or competitiveness of for-hire fishing businesses will be the result of changes in for-hire angler demand and will therefore be indirect in nature. Currently, federally permitted charter and headboat captains and crew can retain black snapper, dog snapper, mahogany snapper, schoolmaster and golden tilefish under the recreational bag limit; however, they cannot sell these fish. As such, charter and headboat captains and crew will only be affected as recreational anglers. The RFA does not consider recreational anglers, who will be directly affected by this final rule, to be small entities, so they are outside the scope of this analysis and only the effects on commercial vessels were analyzed.

As of April 27, 2016, there were 553 vessels with valid or renewable Federal South Atlantic snapper-grouper unlimited permits, 116 vessels with valid or renewable 225-lb (102-kg) trip-limited permits and 22 vessels with valid or renewable longline endorsements for golden tilefish. Data from the years of 2009 through 2013, supplemented by partial 2014 data, were used in Amendment 35, as well as the initial regulatory flexibility analysis (IRFA), and this data provided the basis for the Council's decision. Although all commercial snapper-grouper permit holders have the opportunity to fish for black snapper, dog snapper, mahogany snapper, and/or schoolmaster, on average, there were only four federally permitted vessels identified from 2009 through 2013 that commercially landed one or more of these species each year. The average annual vessel-level revenue for all species harvested by these four vessels over this period was approximately $101,000 (2013 dollars), of which $32 was from black snapper, dog snapper, mahogany snapper, and/or schoolmaster. During the same time period, on average, 22 vessels per year commercially harvested golden tilefish using longline gear and their annual average vessel-level revenue for all species was approximately $95,000 (2013 dollars), of which $55,000 was from golden tilefish. Thirty-seven vessels, on average (2009 through 2013), commercially harvested golden tilefish exclusively with non-longline gear and they earned an average of approximately $46,000 (2013 dollars) per vessel for all species harvested, of which $2,000 was from golden tilefish.

No other small entities that will be directly affected by this final rule have been identified.

The Small Business Administration (SBA) has established size criteria for all major industry sectors in the U.S., including commercial finfish harvesters (NAICS code 114111). A business primarily involved in finfish harvesting is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of $20.5 million for all its affiliated operations worldwide. All of the vessels directly regulated by this final rule are believed to be small entities based on the SBA size criteria.

There are currently 669 vessels eligible to fish for the snapper-grouper species managed under the FMP. Based on the analysis included in the IRFA, NMFS expects only 63 of them will be affected by this final rule (approximately 9 percent). Because all of these commercial fishing businesses are believed to be small entities, the issue of disproportionate effects on small versus large entities does not arise in the present case.

Amendment 35 and this final rule remove black snapper, dog snapper, mahogany snapper, and schoolmaster from the FMP and the regulations. The state of Florida will subsequently extend its management of these species into Federal waters off Florida, for Florida-state registered vessels. Average revenues per vessel from 2009 through 2013 for these four snapper-grouper species accounted for less than 1 percent of average total revenues received by the vessels that commercially harvested these species. Almost all harvest (recreational and commercial) of these species occurs in state and Federal waters off the coast of south Florida. The level of harvest of these species is not expected to change under management by the state of Florida, thus no reduction in associated ex-vessel revenue or profit is expected from this final rule.

This final rule will also modify the golden tilefish longline endorsement regulations. Vessels that have Federal commercial snapper-grouper permits with golden tilefish longline endorsements, specifically those that harvest golden tilefish using both longline and hook-and-line gear, are expected to be negatively affected by this action because they will no longer be able to harvest golden tilefish using hook-and-line gear under the hook-and-line commercial quota. This will result in reduced revenues if they are unable to substitute the harvest of other species. A total of four vessels were identified in 2014 that had a valid or renewable golden tilefish longline endorsement during some part of the year and also harvested golden tilefish under the hook-and-line 500-lb (227-kg) commercial trip limit. On average, these four vessels earned an estimated $8,142 (2013 dollars) per vessel from golden tilefish landings using hook-and-line gear in 2014. This accounts for approximately 9.2 percent of their average total revenue per vessel (2009 through 2013). Therefore, assuming no substitution of other species and constant prices, this final rule is expected to result in an estimated recurring annual loss of $8,142 (2013 dollars) per vessel for the four vessels that harvested golden tilefish using both longline and hook-and-line gear. Conversely, vessels that do not have longline endorsements are expected to indirectly benefit from this final rule, because they will no longer have to compete with longline endorsement holders under the hook-and-line quota. On average, the 37 non-longline endorsement holders identified earlier in this analysis are expected to experience an annual per-vessel increase in revenue of approximately $880 (2013 dollars) or less than 2 percent of their annual average vessel-level revenue.

The following discussion analyzes the alternatives that were not selected as preferred by the Council. Only actions that would have direct economic effects on small entities merit inclusion in the following discussion.

Five alternatives were considered to remove species from the FMP. The first alternative, the no action alternative, would retain all current species in the FMP and would not be expected to have any economic effects. Under the no action alternative, species that do not require Federal management would remain in the FMP and potential cost savings and/or efficiency gains of management would go unrealized. All of the other alternatives were selected as preferred and will result in the removal of black snapper, dog snapper, mahogany snapper, and schoolmaster from Federal management.

Three alternatives, including the preferred alternative, were considered for modifying the golden tilefish endorsement regulations. The first alternative, the no action alternative, would not be expected to have any economic effects. The current golden tilefish endorsement regulations are, however, contrary to the original intent of the Council and unintentionally limit golden tilefish harvest opportunities and economic benefits for hook-and-line fishermen. The second alternative would revise the golden tilefish endorsement regulations so that any vessel with a valid or renewable Federal longline endorsement would not be permitted to harvest golden tilefish under the hook-and-line quota. Under the second alternative, longline endorsement holders that operate more than one vessel (with a Federal snapper-grouper vessel permit) would be able to transfer their golden tilefish longline endorsement to a different vessel and then continue to fish for golden tilefish under the hook-and-line quota in a single year. Only one vessel exhibited this behavior in 2014. Under the second alternative, the negative economic effects on the longline endorsement holders would be less than that expected through this final rule, as would the positive effects experienced by the hook-and-line component of the commercial sector. However, this alternative would be inconsistent with the original Council intent of establishing the longline endorsement in Amendment 18B, which was that vessels with a golden tile longline endorsement would not be eligible to fish for golden tilefish under the hook-and-line gear quota.

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as "small entity compliance guides." The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, NMFS prepared a fishery bulletin, which also serves as a small entity compliance guide. The fishery bulletin will be sent to all interested parties.

List of Subjects in 50 CFR Part 622

Acceptable biological catch, Annual catch limit, Commercial trip limit, Fisheries, Fishing, Quotas, Snapper-grouper, South Atlantic, Species table.

Dated: May 18, 2016.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 622 is amended as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF OF MEXICO, AND SOUTH ATLANTIC

■ 1. The authority citation for part 622 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

■ 2. In part 622, remove "allowable biological catch" and add in its place "acceptable biological catch" wherever it occurs.

■ 3. In § 622.185, paragraph (a)(3) is revised to read as follows:

§ 622.185 Size limits.

* * * * *

(a) * * *

(3) *Blackfin, cubera, gray, queen, silk, and yellowtail snappers*—12 inches (30.5 cm), TL.

* * * * *

■ 4. In § 622.191, the second sentence in paragraph (a)(2)(ii) is revised to read as follows:

§ 622.191 Commercial trip limits.

* * * * *

(a) * * *

(2) * * *

(ii) * * * Vessels that have valid or renewable golden tilefish longline endorsements any time during the fishing year, are not eligible to fish for golden tilefish using hook-and-line gear under this 500-lb (227-kg), gutted weight, trip limit.

* * * * *

■ 5. In § 622.193, paragraphs (h) and (p) are revised to read as follows:

§ 622.193 Annual catch limits (ACLs), annual catch targets (ACTs), and accountability measures (AMs).

* * * * *

(h) *Deep-water complex (including yellowedge grouper, silk snapper, misty grouper, queen snapper, sand tilefish, and blackfin snapper)*—(1) *Commercial sector*—(i) If commercial landings for the deep-water complex, as estimated by the SRD, reach or are projected to reach the commercial ACL of 131,268 lb (59,542 kg), round weight, the AA will file a notification with the Office of the Federal Register to close the commercial sector for the remainder of the fishing year. On and after the effective date of such a notification, all sale or purchase of deep-water complex species is prohibited and harvest or possession of these species in or from the South Atlantic EEZ is limited to the bag and possession limits. These bag and possession limits apply in the South Atlantic on board a vessel for which a valid Federal commercial or charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, without regard to where such species were harvested, *i.e.*, in state or Federal waters.

(ii) If commercial landings exceed the ACL, and the combined commercial and recreational ACL of 169,896 lb (77,064 kg), round weight, is exceeded, and at least one of the species in the deep-water complex is overfished, based on the most recent Status of U.S. Fisheries Report to Congress, the AA will file a notification with the Office of the Federal Register, at or near the beginning of the following fishing year to reduce the commercial ACL for that following year by the amount of the commercial ACL overage in the prior fishing year.

(2) *Recreational sector.* (i) If recreational landings for the deep-water complex, as estimated by the SRD, are projected to reach the recreational ACL of 38,628 lb (17,521 kg), round weight, the AA will file a notification with the Office of the Federal Register to close the recreational sector for the remainder of the fishing year, unless the RA determines that no closure is necessary based on the best scientific information available. On and after the effective date of such a notification, the bag and possession limits are zero.

(ii) If recreational landings for the deep-water complex, exceed the applicable recreational ACL, and the combined commercial and recreational ACL of 169,896 lb (77,064 kg), round weight, is exceeded, and at least one of the species in the deep-water complex is overfished, based on the most recent Status of U.S. Fisheries Report to Congress, the AA will file a notification with the Office of the Federal Register, to reduce the length of the recreational fishing season in the following fishing year to ensure recreational landings do not exceed the recreational ACL the following fishing year. When NMFS reduces the length of the following recreational fishing season and closes the recreational sector, the following closure provisions apply: The bag and possession limits for the deep-water complex in or from the South Atlantic EEZ are zero. Additionally, the recreational ACL will be reduced by the amount of the recreational ACL overage in the prior fishing year. The fishing season and recreational ACL will not be reduced if the RA determines, using the best scientific information available that no reduction is necessary.

* * * * *

(p) *Other snappers complex (including cubera snapper, gray snapper, and lane snapper)*—(1) *Commercial sector*—(i) If commercial landings for the other snappers complex, as estimated by the SRD, reach or are projected to reach the complex commercial ACL of 344,575 lb (156,297 kg), round weight, the AA will file a notification with the Office of the Federal Register, to close the commercial sector for this complex for the remainder of the fishing year. On and after the effective date of such a notification, all sale or purchase of cubera snapper, gray snapper, and lane snapper is prohibited, and harvest or possession of any of these species in or from the South Atlantic EEZ is limited to the bag and possession limits. These bag and possession limits apply in the South Atlantic on board a vessel for which a valid Federal commercial or charter vessel/headboat permit for South Atlantic snapper-grouper has been issued, without regard to where such species were harvested, *i.e.*, in state or Federal waters.

(ii) If commercial landings for the other snappers complex, as estimated by the SRD, exceed the commercial ACL, and the combined commercial and recreational ACL of 1,513,883 lb (686,686 kg), round weight, is exceeded, and at least one of the species in the other snappers complex is overfished, based on the most recent Status of U.S. Fisheries Report to Congress, the AA will file a notification with the Office of the Federal Register to reduce the commercial ACL for that following year by the amount of the commercial ACL overage in the prior fishing year.

(2) *Recreational sector*—(i) If recreational landings for the other snappers complex, as estimated by the SRD, reach or are projected to reach the recreational ACL of 1,169,308 lb (530,391 kg), round weight, the AA will file a notification with the Office of the Federal Register to close the recreational sector for the remainder of the fishing year regardless if any stock in the other snappers complex is overfished, unless NMFS determines that no closure is necessary based on the best scientific information available. On and after the effective date of such a notification, the bag and possession limits for any species in the other snappers complex in or from the South Atlantic EEZ are zero.

(ii) If recreational landings for the other snappers complex, as estimated by the SRD, exceed the recreational ACL, then during the following fishing year, recreational landings will be monitored for a persistence in increased landings, and if necessary, the AA will file a notification with the Office of the Federal Register, to reduce the length of the recreational fishing season and the recreational ACL by the amount of the recreational ACL overage, if at least one of the species in the other snappers complex is overfished based on the most recent Status of U.S. Fisheries Report to Congress, and the combined commercial and recreational ACL of 1,513,883 lb (686,686 kg), round weight, is exceeded during the same fishing year. NMFS will use the best scientific information available to determine if reducing the length of the recreational fishing season and recreational ACL is necessary. When the recreational sector is closed as a result of NMFS reducing the length of the recreational fishing season and the ACL, the bag and possession limits for any species in the other snappers complex in or from the South Atlantic EEZ are zero.

* * * * *

■ 6. In Appendix A to part 622, Table 4 is revised to read as follows:

Appendix A to Part 622—Species Tables

* * * * *

TABLE 4 OF APPENDIX A TO PART 622—SOUTH ATLANTIC SNAPPER-GROUPER

- Balistidae—Triggerfishes
  - Gray triggerfish, *Balistes capriscus*
- Carangidae—Jacks
  - Bar jack, *Caranx ruber*
  - Greater amberjack, *Seriola dumerili*
  - Lesser amberjack, *Seriola fasciata*
  - Almaco jack, *Seriola rivoliana*
  - Banded rudderfish, *Seriola zonata*
- Ephippidae—Spadefishes
  - Spadefish, *Chaetodipterus faber*
- Haemulidae—Grunts
  - Margate, *Haemulon album*
  - Tomtate, *Haemulon aurolineatum*
  - Sailor's choice, *Haemulon parrai*
  - White grunt, *Haemulon plumieri*
- Labridae—Wrasses
  - Hogfish, *Lachnolaimus maximus*
- Lutjanidae—Snappers
  - Queen snapper, *Etelis oculatus*
  - Mutton snapper, *Lutjanus analis*
  - Blackfin snapper, *Lutjanus buccanella*
  - Red snapper, *Lutjanus campechanus*
  - Cubera snapper, *Lutjanus cyanopterus*
  - Gray snapper, *Lutjanus griseus*
  - Lane snapper, *Lutjanus synagris*
  - Silk snapper, *Lutjanus vivanus*
  - Yellowtail snapper, *Ocyurus chrysurus*
  - Vermilion snapper, *Rhomboplites aurorubens*
- Malacanthidae—Tilefishes
  - Blueline tilefish, *Caulolatilus microps*

TABLE 4 OF APPENDIX A TO PART 622—SOUTH ATLANTIC SNAPPER-GROUPER—Continued

- Golden tilefish, *Lopholatilus chamaeleonticeps*
- Sand tilefish, *Malacanthus plumieri*

Percichthyidae—Temperate basses
- Wreckfish, *Polyprion americanus*

Serranidae—Groupers
- Rock hind, *Epinephelus adscensionis*
- Graysby, *Epinephelus cruentatus*
- Speckled hind, *Epinephelus drummondhayi*
- Yellowedge grouper, *Epinephelus flavolimbatus*
- Coney, *Epinephelus fulvus*
- Red hind, *Epinephelus guttatus*
- Goliath grouper, *Epinephelus itajara*
- Red grouper, *Epinephelus morio*
- Misty grouper, *Epinephelus mystacinus*
- Warsaw grouper, *Epinephelus nigritus*
- Snowy grouper, *Epinephelus niveatus*
- Nassau grouper, *Epinephelus striatus*
- Black grouper, *Mycteroperca bonaci*
- Yellowmouth grouper, *Mycteroperca interstitialis*
- Gag, *Mycteroperca microlepis*
- Scamp, *Mycteroperca phenax*
- Yellowfin grouper, *Mycteroperca venenosa*

Serranidae—Sea Basses:
- Black sea bass, *Centropristis striata*

Sparidae—Porgies
- Jolthead porgy, *Calamus bajonado*
- Saucereye porgy, *Calamus calamus*
- Whitebone porgy, *Calamus leucosteus*
- Knobbed porgy, *Calamus nodosus*
- Red porgy, *Pagrus pagrus*
- Scup, *Stenotomus chrysops*

The following species are designated as ecosystem component species:
- Cottonwick, *Haemulon melanurum*
- Bank sea bass, *Centropristis ocyurus*
- Rock sea bass, *Centropristis philadelphica*
- Longspine porgy, *Stenotomus caprinus*
- Ocean triggerfish, *Canthidermis sufflamen*

* * * * *

[FR Doc. 2016–12077 Filed 5–20–16; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 81, No. 99
Monday, May 23, 2016

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–6671; Directorate Identifier 2015–NM–164–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Airbus Model A300B4–203 and A300B4–2C airplanes. This proposed AD was prompted by cracks found on pylon side panels (upper section) at rib 8. This proposed AD would require a detailed inspection for crack indications of the pylon side panels, a high frequency eddy current (HFEC) inspection to confirm any crack indications, modification of the pylon side panels, and repetitive inspections and repair if necessary. We are proposing this AD to detect and correct cracking of the pylon side panels. Such cracking could result in pylon structural failure and in-flight loss of an engine.

DATES: We must receive comments on this proposed AD by July 7, 2016.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this NPRM, contact Airbus SAS, Airworthiness Office—EAW, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airworth-eas@airbus.com;* Internet *http://www.airbus.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–6671; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–2125; fax 425–227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2016–6671; Directorate Identifier 2015–NM–164–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA Airworthiness Directive 2015–0201, dated October 7, 2015 (referred to after this as the Mandatory Continuing Airworthiness Information, or "the MCAI"), to correct an unsafe condition for certain Airbus Model A300B4–203 and A300B4–2C airplanes. The MCAI states:

> Cracks were found on pylon side panels (upper section) at rib 8 on Airbus A300, A310 and A300–600 aeroplanes equipped with General Electric engines. Investigation of these findings indicated that this problem was likely to also affect aeroplanes of this type design with other engine installations.
>
> This condition, if not detected and corrected, could lead to reduced strength of the pylon primary structure, possibly resulting in pylon structural failure and in-flight loss of an engine.
>
> Prompted by these findings, EASA issued AD 2008–0181 [which corresponded to FAA AD 2010–06–04, Amendment 39–16228 (75 FR 11428, March 11, 2010; corrected May 4, 2010 (75 FR 23572))] to require repetitive detailed visual inspections and, depending on aeroplane configuration and/or findings, the accomplishment of applicable corrective action(s).
>
> Since that [EASA] AD 2008–0181 was issued, a fleet survey and updated Fatigue and Damage Tolerance analyses have been performed in order to substantiate the second A300–600 Extended Service Goal (ESG2) exercise. The results of these analyses have shown that the risk for these aeroplanes is higher than initially determined and consequently, the threshold and interval were reduced to allow timely detection of these cracks and the accomplishment of applicable corrective action(s).
>
> Consequently, EASA AD 2013–0136 was published to supersede EASA AD 2008–0181 and to require the inspections to be accomplished within reduced thresholds and intervals. Afterwards, [EASA] AD 2013–0136 was mistakenly revised [EASA AD 2013–0136R1 corresponds to FAA AD 2015–26–06, Amendment 39–18354 (81 FR January 14,2016)] to reduce the Applicability, because it was considered at the time that aeroplanes on which Airbus mod 03599 was embodied, were not concerned by the requirements of EASA AD 2013–0136.
>
> Since EASA AD 2013–0136R1 was issued, a more thorough analysis determined that post-mod 03599 aeroplanes could be affected by this unsafe condition after all.
>
> [During] further deeper review, a list of nineteen A300 aeroplanes was identified as

missing in the [EASA] AD 2013–0136R1 applicability, (aeroplanes post-mod 03599).

For the reasons described above this AD retains the requirements of EASA AD 2013–0136R1 and mandates these requirements for the 19 missing A300 aeroplanes MSNs.

You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–6671.

Related Service Information Under 1 CFR Part 51

Airbus has issued Service Bulletin A300–54–0075, Revision 04, dated May 26, 2015. The service information describes procedures for an inspection for crack indications of the pylons, a HFEC inspection to confirm cracking, modification of the pylon side panels, and repairs if cracks are found.

Airbus has also issued Service Bulletin A300–54–0081, dated August 11, 1993. This service information describes installation of a doubler on the left pylon 1 and right pylon 2, on pylon side panels (upper section) at Rib 8.

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of these same type designs.

Differences Between Proposed Rule and Service Bulletin

Unlike the procedures described in Airbus Service Bulletin A300–54–0075, Revision 04, dated May 26, 2015, this proposed AD would not permit further flight if cracks are detected in the pylon or pylon side panels. We have determined that because of the safety implications and consequences associated with that cracking, any cracked pylon or pylon side panel must be repaired or modified before further flight. This difference has been coordinated with EASA.

Costs of Compliance

We estimate that this proposed AD affects 4 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Cost per product	Cost on U.S. operators
Inspection of the pylon side panels.	30 work-hours × $85 per hour = $2,550 per inspection cycle.	$2,550 per inspection cycle	$10,200 per inspection cycle.

We estimate the following costs to do any necessary repairs that would be required based on the results of the proposed inspection. We have no way of determining the number of airplanes that might need this repair.

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Crack Repair	56 work-hours × $85 per hour = $4,760 per repair	$3,910 per repair	$8,670 per repair.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. "Subtitle VII: Aviation Programs," describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in "Subtitle VII, Part A, Subpart III, Section 44701: General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

1. Is not a "significant regulatory action" under Executive Order 12866;
2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);
3. Will not affect intrastate aviation in Alaska; and
4. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

Airbus: Docket No. FAA–2016–6671; Directorate Identifier 2015–NM–164–AD.

(a) Comments Due Date

We must receive comments by July 7, 2016.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Airbus Model A300B4–203 and A300B4–2C airplanes, certificated in any category, manufacturer serial numbers 210, 212, 218, 220, 227, 234, 235, 236, 239, 247, 255, 256, 259, 261, 274, 277, 292, 299, and 302.

(d) Subject

Air Transport Association (ATA) of America Code 54, Nacelles/Pylons.

(e) Reason

This AD was prompted by cracks found on pylon side panels (upper section) at rib 8. We are proposing this AD to detect and correct cracking of the pylon side panels. Such cracking could result in pylon structural failure and in-flight loss of an engine.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Detailed Inspection of Pylons and Corrections

At the applicable time specified in Airbus Service Bulletin A300–54–0075, Revision 04, dated May 26, 2015: Do a detailed inspection for crack indications of the pylons 1 and 2 side panels (upper section) at rib 8, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A300–54–0075, Revision 04, dated May 26, 2015.

(h) Crack Confirmation

If any crack indication is found during the inspection required by paragraph (g) of this AD: Before further flight, do a high frequency eddy current (HFEC) inspection to confirm the crack, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A300–54–0075, Revision 04, dated May 26, 2015.

(i) Follow-On Actions for No Crack/Indication

If the inspection required by paragraph (g) of this AD reveals no crack indication, or if the HFEC inspection specified by paragraph (h) of this AD confirms no crack: Do the actions specified in either paragraph (i)(1) or (i)(2) of this AD.

(1) Repeat the inspection required by paragraph (g) of this AD at the applicable time specified in Airbus Service Bulletin A300–54–0075, Revision 04, dated May 26, 2015.

(2) At the applicable time specified in Airbus Service Bulletin A300–54–0081, dated August 11, 1993: Modify the pylons, in accordance with Airbus Service Bulletin 300–54–0081, dated August 11, 1993. Thereafter, repeat the HFEC inspection specified in paragraph (h) of this AD at the applicable interval specified in Airbus Service Bulletin A300–54–0075, Revision 04, dated May 26, 2015, and repair any crack before further flight using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA); or Airbus's EASA Design Organization Approval (DOA).

(j) Follow-On Actions for Crack Findings

If any crack is confirmed during the inspection required by paragraph (h) of this AD, repair before further flight using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or EASA; or Airbus's EASA DOA.

(k) Credit for Previous Actions

This paragraph provides credit for actions required by paragraphs (g), (h), (i), and (j) of this AD, if those actions were performed before the effective date of this AD using the service information specified in paragraphs (k)(1) through (k)(4) of this AD.

(1) Airbus Service Bulletin A300–54–0075, dated August 11, 1993, which was incorporated by referenced in AD 2010–06–04, Amendment 39–16228 (75 FR 11428, March 11, 2010); corrected May 4, 2010 (75 FR 23572).

(2) Airbus Service Bulletin A300–54–0075, Revision 01, dated November 9, 2007, which is not incorporated by reference in this AD.

(3) Airbus Service Bulletin A300–54–0075, Revision 02, dated June 26, 2008, which is not incorporated by reference in this AD.

(4) Airbus Service Bulletin A300–54–0075, Revision 03, dated March 27, 2013, which is not incorporated by reference in this AD.

(l) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–2125; fax 425–227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the EASA; or Airbus's EASA DOA. If approved by the DOA, the approval must include the DOA-authorized signature.

(m) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA Airworthiness Directive 2015–0201, dated October 7, 2015, for related information. This MCAI may be found in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–6671.

(2) For service information identified in this AD, contact Airbus SAS, Airworthiness Office—EAW, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airworth-eas@airbus.com;* Internet *http://www.airbus.com.* You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on May 11, 2016.

Suzanne Masterson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–11681 Filed 5–20–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 882 and 895

[Docket No. FDA–2016–N–1111]

Banned Devices; Proposal To Ban Electrical Stimulation Devices Used To Treat Self-Injurious or Aggressive Behavior; Extension of Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule; extension of comment period.

SUMMARY: The Food and Drug Administration (FDA) is extending the comment period for the proposed rule that appeared in the **Federal Register** of April 25, 2016. In the proposed rule, FDA requested comments for a ban on electrical stimulation devices (ESDs) used for self-injurious or aggressive behavior (SIB or AB). The Agency is taking this action in response to requests for an extension to allow interested persons additional time to submit comments.

DATES: FDA is extending the comment period on the proposed rule published April 25, 2016 (81 FR 24386). Submit either electronic or written comments by July 25, 2016.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *http://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *http://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket No. FDA–2016–N–1111 for "Proposal to Ban Electrical Stimulation Devices Used to Treat Self-Injurious or Aggressive Behavior." Received comments will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- *Confidential Submissions*—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *http://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Rebecca Nipper, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1540, Silver Spring, MD 20993–0002, 301–796–6527.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of April 25, 2016, FDA published a proposed rule with a 30-day comment period to request comments on a proposal to ban ESDs used for SIB or AB. Comments on the proposed ban will inform FDA's rulemaking.

The Agency has received requests for a 60-day extension of the comment period for the proposed rule. Each request conveyed concern that the current 30-day comment period does not allow sufficient time to develop a meaningful or thoughtful response to the proposed rule.

FDA has considered the requests and is extending the comment period for the proposed rule for 60 days, until July 25, 2016. The Agency believes that a 60-day extension allows adequate time for interested persons to submit comments without significantly delaying rulemaking on this important issue.

Dated: May 17, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–12026 Filed 5–20–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

30 CFR Part 550

[Docket ID: BOEM–2013–0081]

RIN 1010–AD82

Air Quality Control, Reporting, and Compliance

AGENCY: Bureau of Ocean Energy Management (BOEM), Interior.

ACTION: Proposed rule; notice of extension of public comment period.

SUMMARY: BOEM is extending the public comment period to submit comments on the proposed rule entitled "Air Quality Control, Reporting, and Compliance," which was published in the **Federal Register** on April 5, 2016. The original public comment period to submit comments on this rulemaking would have ended on June 6, 2016. However, BOEM has received public comments requesting an extension of the comment period. BOEM has reviewed the extension requests and has determined that a 14-day comment period extension to June 20, 2016, is appropriate. The proposed rule specified a separate, shorter period to submit comments to the Office of Management and Budget on the information collection (IC) burden in this rulemaking. That comment period ended on May 5, 2016, and will not be extended.

DATES: The comment period for comments on the substance of the proposed rule published on April 5, 2016 (81 FR 19717), has been extended. Written comments must be received by the extended due date of June 20, 2016. BOEM may not fully consider comments received after this date.

ADDRESSES: You may submit comments identified by the number 1010–AD82, by any of the following methods:

- *Federal rulemaking portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Department of the Interior, Bureau of Ocean Energy Management, Office of Policy, Regulation and Analysis, Attention: Peter Meffert, 45600 Woodland Road, Sterling, Virginia 20166.
- *Hand delivery:* Front Desk, Department of the Interior, Bureau of

Ocean Energy Management, Office of Policy, Regulation and Analysis, Attention: Peter Meffert, 45600 Woodland Road, Sterling, Virginia 20166.

- *Public Availability of Comments:* BOEM does not consider anonymous comments; please include your name and address as part of your submittal. Before including your name, address, phone number, email address, or other personally identifiable information in your comment, you should be aware that your entire comment—including your personally identifiable information—may be made publicly available at any time. While you can ask us in your comment to withhold your personally identifiable information from public review, we cannot guarantee that we will be able to do so.

FOR FURTHER INFORMATION CONTACT: Peter Meffert, Bureau of Ocean Energy Management, Office of Policy, Regulation and Analysis, at *peter.meffert@boem.gov* or mail to 45600 Woodland Road, Sterling, Virginia 20166; or call (703) 787–1610.

SUPPLEMENTARY INFORMATION: BOEM published a proposed rule on Air Quality Control, Reporting, and Compliance on April 5, 2016. The proposed rule is intended to revise and replace BOEM's air quality regulations with a new set of regulations that reflect a number of policy changes with respect to the existing air quality regulatory program. The key policy changes in the proposed rule relate to: (1) Fulfilling BOEM's statutory responsibility under section 5(a)(8) of the Outer Continental Shelf Lands Act by addressing all relevant criteria and major precursor air pollutants and by cross-referencing the ambient air quality standards and benchmarks (AAQSB) for those pollutants to those of the U.S. Environmental Protection Agency; (2) formalizing the concept and application of the term "attributed emissions"; (3) changing the methods for determining the locations from which air emissions will be measured and evaluated; (4) modifying the process by which emission exemption threshold (EETs) are established and updated; (5) changing the circumstances when emission reduction measures (ERM), including Best Available Control Technology (BACT), are required, and establishing new criteria for the application of ERM; (6) revising the boundary at which BOEM determines air quality compliance to the State seaward boundary (SSB), rather than the coastline; (7) formalizing requirements for the consolidation of emissions from multiple facilities; (8) consistent with BOEM's existing regulatory authority, articulating a schedule for ensuring that plans, including previously approved plans, will be compliant with these updated regulations; (9) adding an air quality component to the submission of right-of-use and easement, right-of-way, and lease term pipeline applications; (10) expanding use of the offsets as an alternative in circumstances where BACT was previously required; and (11) adding a new requirement for all plans to be reviewed at least every 10 years, to ensure ongoing compliance with the National Ambient Air Quality Standards (NAAQS), as amended from time to time.

After publication of the proposed rule, BOEM received public comments requesting an extension.

On March 17, 2016, BOEM issued a press release to notify the public that the proposed rule would be issued and provided an internet link to an advance copy of the proposed rule. On April 5, 2016, BOEM issued the proposed rule with a requirement to submit comments on the substance of this rulemaking by June 6, 2016. BOEM is extending the comment period to June 20, 2016. With more than 90 days of public inspection, BOEM has concluded that interested parties will have sufficient opportunity to analyze the proposed rule and provide comment. Accordingly, written comments on the substance of this rulemaking must be submitted by the extended due date of June 20, 2016.

The proposed rule specified a separate, shorter period to submit comments to the Office of Management and Budget on the information collection (IC) burden in this rulemaking. That comment period ended on May 5, 2016, and will not be extended.

Dated: May 17, 2016.

Amanda C. Leiter,

Acting Assistant Secretary—Land and Minerals Management.

[FR Doc. 2016–12099 Filed 5–20–16; 8:45 am]

BILLING CODE 4310–MR–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R01–OAR–2012–0289; FRL–9946–68–Region 1]

Air Plan Approval; New Hampshire; Ozone Maintenance Plan

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a State Implementation Plan (SIP) revision submitted by the State of New Hampshire that contains an ozone maintenance plan for New Hampshire's former 1-hour ozone nonattainment areas. The Clean Air Act requires that areas that are designated attainment for the 1997 8-hour ozone standard, and also had been previously designated either nonattainment or maintenance for the 1-hour ozone standard, develop a plan showing how the state will maintain the ozone standard for the area. The intended effect of this action is to propose approval of New Hampshire's maintenance plan. This action is being taken in accordance with the Clean Air Act.

DATES: Written comments must be received on or before June 22, 2016.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R01–OAR–2012–0289 at *http://www.regulations.gov,* or via email to *arnold.anne@epa.gov.* For comments submitted at *Regulations.gov,* follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* For either manner of submission, the EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Anne Arnold, Air Quality Planning Unit, U.S. Environmental Protection Agency, Suite 100, Mail Code OEP05–02, Boston, MA 02109–3912, telephone number (617) 918–1047, fax number (617) 918–0047, email *arnold.anne@epa.gov.*

SUPPLEMENTARY INFORMATION: In the Final Rules Section of this **Federal**

Register, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment. For additional information, see the direct final rule which is located in the Rules Section of this **Federal Register**.

Dated: May 4, 2016.

H. Curtis Spalding,

Regional Administrator, EPA New England.

[FR Doc. 2016–11966 Filed 5–20–16; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 62

[Docket ID: FEMA–2016–0012]

RIN 1660–AA86

National Flood Insurance Program (NFIP): Financial Assistance/Subsidy Arrangement

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Emergency Management Agency (FEMA) is proposing to remove the copy of the Financial Assistance/Subsidy Arrangement and the summary of the Financial Control Plan from the appendices of its National Flood Insurance Program regulations, as it is no longer necessary or appropriate to retain a contract, agreement, or any other arrangement between FEMA and private insurance companies in the Code of Federal Regulations.

DATES: Comments are due on or before July 22, 2016.

ADDRESSES: You may submit comments, identified by Docket ID: FEMA–2016–0012, by one of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Mail/Hand Delivery/Courier: Regulatory Affairs Division, Office of Chief Counsel, Federal Emergency Management Agency, Room 8NE, 500 C Street SW., Washington, DC 20472–3100.

To avoid duplication, please use only one of these methods. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. For instructions on submitting comments, see the Public Participation portion of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Claudia Murphy, Director, Policyholder Services Division, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 400 C Street SW., Washington, DC 20472, (202) 646–2775.

SUPPLEMENTARY INFORMATION:

I. Public Participation

We encourage you to participate in this rulemaking by submitting comments and related materials. We will consider all comments and material received during the comment period.

If you submit a comment, identify the agency name and the docket ID for this rulemaking, indicate the specific section of this document to which each comment applies, and give the reason for each comment. You may submit your comments and material by electronic means, mail, or delivery to the address under the **ADDRESSES** section. Please submit your comments and material by only one means.

Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal e-Rulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy Act notice that is available via a link on the homepage of *http://www.regulations.gov.*

Viewing comments and documents: For access to the docket to read background documents or comments received, go to the Federal e-Rulemaking Portal at *http://www.regulations.gov.* Background documents and submitted comments may also be inspected at FEMA, Office of Chief Counsel, Room 8NE, 500 C Street SW., Washington, DC 20472–3100.

II. Background

The National Flood Insurance Act of 1968 (NFIA), as amended (42 U.S.C. 4001 *et seq.*), authorizes the Administrator of the Federal Emergency Management Agency (FEMA) to establish and carry out a National Flood Insurance Program (NFIP) to enable interested persons to purchase insurance against loss resulting from physical damage to or loss of real or personal property arising from flood in the United States. *See* 42 U.S.C. 4011(a). The NFIA states the NFIP is intended to be "a program of flood insurance with large-scale participation of the Federal Government and carried out to the maximum extent practicable by the private insurance industry." *See* 42 U.S.C. 4001(b). Under the NFIA, FEMA has the authority to carry out the NFIP through the facilities of the Federal government, utilizing, for the purposes of providing flood insurance coverage, insurance companies and other insurers, insurance agents and brokers, and insurance adjustment organizations, as fiscal agents of the United States. *See* 42 U.S.C. 4071.

Pursuant to this authority, FEMA works closely with the insurance industry to facilitate the sale and servicing of flood insurance policies. An NFIP flood insurance policy, also known as the Standard Flood Insurance Policy (SFIP), can be purchased: (1) Directly from the Federal government through a direct servicing agent, or (2) from a participating Write Your Own (WYO) insurance company through the WYO Program. The SFIPs set out the terms and conditions of insurance. *See* 44 CFR part 61, Appendix A. FEMA establishes terms, rate structures, and premium costs of SFIPs. The terms, coverage limits, and flood insurance premiums are the same whether purchased from the NFIP Direct or the WYO Program.

FEMA established the WYO Program in 1983 to increase the NFIP policy count and geographic distribution of policies by taking advantage of the private insurance industry's marketing channels and existing policy base to sell flood insurance. *See* 48 FR 46789 (Oct. 14, 1983) (establishing the WYO Program). Seventy-nine private property or casualty insurance companies participate in this program today.[1]

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[1] Federal Emergency Management Agency, Write Your Own Flood Insurance Company List, *http://www.fema.gov/wyo_company* (last accessed April 8, 2016).

The NFIA authorizes FEMA to "enter into any contracts, agreements, or other arrangements" with private insurance companies to utilize their facilities and services in administering the NFIP, and on such terms and conditions as may be agreed upon. *See* 42 U.S.C. 4081(a). Pursuant to this authority, FEMA enters into a standard Financial Assistance/Subsidy Arrangement (Arrangement) with private sector property insurers, also known as the WYO Companies, to sell NFIP flood insurance policies under their own names and adjust and pay claims arising under the SFIP. Each Arrangement entered into by a WYO Company must be in the form and substance of the standard Arrangement, a copy of which is in 44 CFR part 62, Appendix A. *See* 44 CFR 62.23(a). The standard Arrangement specifies the terms and conditions of utilizing the WYO Companies' facilities and services to carry out the NFIP. Each year, FEMA publishes in the **Federal Register** [2] and makes available to the WYO Companies the terms for subscription or re-subscription to the Arrangement. *See* Financial Assistance/Subsidy Arrangement, Article V(B). Under the Arrangement, participating WYO companies offer flood insurance coverage under the NFIP to eligible applicants, and write and service the SFIP in their own names. WYO Companies are responsible for all aspects of servicing of the policies, including policy issuance to new policyholders, endorsement, underwriting, renewal of policies, and cancellation of policies. WYO Companies are also responsible for compliance with community eligibility/rating criteria, making policyholder eligibility determinations, correspondence, and the payment of agents' commissions. The WYO Companies also investigate, adjust, settle, and defend all claims or losses arising from policies issued under the Arrangement. In addition, under the Arrangement, WYO Companies market flood insurance policies in a manner consistent with marketing guidelines established by FEMA. The WYO Companies are required to meet the requirements of a Financial Control Plan (see below for explanation of the Financial Control Plan), and submit to FEMA monthly Financial Reporting and Statistical Transaction reports.

In accordance with the Arrangement, WYO Companies retain a specific amount of policyholder premium for their operating and administrative expenses, for a commission allowance to meet commission or salaries of insurance agents, brokers, or other entities producing qualified flood insurance applications, and other related expenses. FEMA also reimburses WYO Companies for certain unallocated, allocated, and special allocated loss adjustment expenses as provided for in the Arrangement.

The Arrangement includes an arbitration provision applicable if any misunderstanding or dispute arises between FEMA and a WYO Company with reference to any factual issue under any provision of the Arrangement or with respect to FEMA's non-renewal of the Company's participation. The Arrangement also includes provisions related to information and annual statements, access to books and records, cash management and accounting, offset, errors and omissions, terms for the commencement and termination of the Arrangement, and other miscellaneous provisions.

Since the primary relationship between the Federal government and the WYO Companies is one of a fiduciary nature (that is, to ensure that any taxpayer funds are appropriately expended), FEMA established "A Plan to Maintain Financial Control for Business Written Under the Write Your Own Program," also known as the "Financial Control Plan." *See* 42 U.S.C. 4071; 44 CFR 62.23(f), Part 62, App. B. To ensure financial and statistical control over the NFIP, as part of the Arrangement WYO companies agree to adhere to the standards and requirements in the Financial Control Plan. The Financial Control Plan includes standards and requirements for financial, underwriting, and other audits of participating WYO companies. Reconciliation procedures for the Transaction Record Reporting and Processing (TRRP) Plan are also outlined in the Financial Control Plan, in addition to other financial controls, such as the Claims Reinspection Program, report certifications and signature authorizations, and operation review procedures.

In 1985, FEMA added a copy of the Financial Control Plan to the NFIP regulations at 44 CFR part 62, Appendix B. However, in 1999, FEMA removed the copy of the Financial Control Plan from the regulations and replaced it with a summary, thus allowing the Federal government and its industry partners the flexibility to make operational adjustments and corrections more efficiently and more quickly while retaining the broad framework necessary for sound financial controls. *See* 64 FR 56174 (Oct. 18, 1999).

III. Discussion of Proposed Rule

In this rule, FEMA proposes to remove the copy of the Arrangement in 44 CFR part 62, Appendix A, and the summary of the Financial Control Plan in 44 CFR part 62, Appendix B. In addition, FEMA proposes to make conforming amendments to update citations to these appendices in Section 62.23.

1. Financial Assistance/Subsidy Arrangement: 44 CFR Part 62, Appendix A

FEMA proposes to remove the copy of the Arrangement in 44 CFR part 62, Appendix A, because it is no longer necessary to include a copy of the Arrangement in the Code of Federal Regulations (CFR), and the NFIA does not require FEMA to include a copy of the Arrangement in the CFR. *See* 42 U.S.C. 4081. In 1985, FEMA added a copy of the Arrangement to the appendix of 44 CFR part 62 to inform the public of the procedural details of the WYO program. *See* 50 FR 16236 (April 25, 1985). However, since that time, there have been technological advances for disseminating information to the public, and there are now more efficient ways to inform the public of the procedural details of the WYO program. For example, FEMA now posts a copy of the Arrangement on its Web site.[3] Moreover, after more than thirty years of operation, the public is more familiar with the procedural details of the WYO Program and the flood insurance provided through WYO Companies than it was in 1985, after only two years of operation. Additionally, FEMA proposes to remove the copy of the Arrangement in 44 CFR part 62, Appendix A, because it is inappropriate to codify in regulation a contract, agreement, or other arrangement between FEMA and private insurance companies.

By removing the copy of the Arrangement from the appendix of Part 62, FEMA and its industry partners maintain the flexibility to negotiate operational adjustments and corrections to the Arrangement more quickly and efficiently. Because a copy of the Arrangement is currently in the CFR, FEMA must undergo rulemaking to update the Arrangement. Since 1985, when FEMA added a copy of the Arrangement to the CFR, FEMA has undergone rulemaking approximately 21 times to make corrections and updates to the Arrangement. Although the rulemaking process plays an important role in agency policymaking, when this process is not required or necessary, the requirement to undergo rulemaking can unnecessarily slow down the operation of the NFIP by FEMA and its industry partners and can result in the use of alternate, less than ideal measures that result in business and operational inefficiencies.

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[2] *See, e.g.,* 80 FR 46313 (Aug. 4, 2015).

[3] FEMA, WYO Company Financial Assistance/Subsidy Arrangement, *http://www.fema.gov/media-library/assets/documents/17972?id=4054* (last accessed April 8, 2016).

For example, under Article II(C) of the Arrangement, following a catastrophic event, WYO companies agreed to adjust combined flood and wind losses utilizing one adjuster under the NFIP-approved Single Adjuster Program (SAP) using procedures issued by FEMA. This practice proved functionally impractical. Rather than undergo rulemaking to remove the SAP requirement from the Arrangement, since 2012 FEMA has granted a limited waiver of this requirement, pursuant to FEMA's waiver authority in Section 62.23(k) of FEMA's regulations. FEMA communicated the exceptions to and under Section 62.23(k) through WYO Bulletins.[4] This may cause confusion for NFIP stakeholders and the general public because the copy of the Arrangement in the CFR does not reflect those updates. Once FEMA removes the copy of the Arrangement from the CFR, however, FEMA can make changes such as removal of the revisions to the SAP requirement before the beginning of the next Arrangement period, without engaging in rulemaking and without workarounds such as FEMA's limited waiver authority. In addition, FEMA would be able to implement updates and corrections more efficiently, and would have the flexibility to negotiate longer Arrangement terms; currently, the Arrangement is signed and in effect for a one-year period, but in the future, FEMA could offer an Arrangement term for a two- or three-year period. FEMA also recognizes that insurance industry practices and technology evolve at a fast pace, providing efficiencies and customer-centric innovations that can streamline and improve the financial stability and customer focus of the NFIP. FEMA would be able to implement changes to the NFIP to take advantage of innovations and technology changes in an efficient and timely manner.

Once a copy of the Arrangement is removed from the CFR, FEMA will continue to enter into the Arrangement with WYO Companies, and in accordance with the terms of the current Arrangement, FEMA will continue to notify private insurance companies and make available to companies the terms for subscription or re-subscription of the Arrangement through a notice in the **Federal Register**. *See* Financial Assistance/Subsidy Arrangement, Article V(B). As is current practice, all private insurance companies wishing to participate in the WYO Program should request subscription or re-subscription in accordance with the instructions in the **Federal Register** notice published before each fiscal year. *See* 80 FR 46313 (Aug. 4, 2015). FEMA evaluates requests from private insurance companies to participate using publicly available information, industry performance data, and other criteria outlined in FEMA's regulations and in the Arrangement. FEMA will also continue to send a copy of the offer for the Arrangement each fiscal year, together with related materials and submission instructions, to all private insurance companies successfully evaluated by the NFIP.

Under the Biggert-Waters Flood Insurance Reform Act of 2012 (BW–12), FEMA is required to issue a rule to formulate revised expense reimbursements to property and casualty insurance companies participating in the WYO Program for their expenses servicing standard flood insurance policies, including how such companies shall be reimbursed in both catastrophic and non-catastrophic years. Sec. 100224, Public Law 112–141, 126 Stat. 936. FEMA is in the process of developing this rulemaking and will issue a notice of proposed rulemaking in the future.

2. A Plan To Maintain Financial Control for Business Written Under the Write Your Own Program: 44 CFR Part 62, Appendix B

FEMA proposes to remove the summary of the Financial Control Plan in 44 CFR part 62, Appendix B. As discussed, beginning in 1985, FEMA included a copy of the Financial Control Plan in regulation at 44 CFR part 62, Appendix B. In 1999 FEMA removed the copy of the Financial Control Plan from FEMA's regulations and replaced it with a summary of the Financial Control Plan. 64 FR 56174 (Oct. 18, 1999). FEMA proposes to remove the summary of the Financial Control Plan in Appendix B because this information is contained in either FEMA's Financial Control Plan,[5] or in 44 CFR Section 62.23, and thus reprint elsewhere in the CFR is duplicative and unnecessary.

Paragraphs (a) and (b) of Appendix B contain a general overview of the Arrangement and the Financial Control Plan. FEMA is removing this information from Appendix B because this information is also contained in the Arrangement, the Financial Control Plan, and FEMA's regulations at Section 62.23, and is therefore duplicative and unnecessary. Paragraph (c) of Appendix B describes the roles and responsibilities of the Standards Committee. FEMA is removing this information from Appendix B because this information describes internal procedural details of the Standards Committee, which do not need to be in regulation. In addition, paragraph (c) contains information related to the Standards Committee that is already codified in FEMA's regulations at Section 62.23 and in FEMA's Financial Control Plan. As a result, FEMA proposes to remove this information from Appendix B because it is duplicative and unnecessary. In paragraphs (d) and (e) of Appendix B, there is the Financial Control Plan Table of Contents, and information on where to obtain a copy of the Financial Control Plan. FEMA is removing this information from Appendix B because a copy of the Financial Control Plan is available on FEMA's Web site, and the NFIA does not require this information to be in regulation.

3. Amendments to 44 CFR 62.23 To Remove Reference to Appendices A and B

FEMA proposes to make conforming amendments to the language in 44 CFR 62.23 where FEMA references Appendix A and Appendix B of 44 CFR part 62, because those appendices will be removed. In paragraphs (a) and (i)(1) of Section 62.23, FEMA proposes to remove reference to Appendix A, because FEMA proposes to remove the copy of the Arrangement in Appendix A. In addition, in paragraphs (f) and (l)(2) of Section 62.23, FEMA proposes to remove reference to Appendix B, because FEMA proposes to remove the summary of the Financial Control Plan in Appendix B.

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[4] See FEMA, Memorandum For: WYO Principal Coordinators and the NFIP Direct Servicing Agent, Granting a Limited Waiver for Insurance Companies Participating in the WYO Program of the SAP found in 44 CFR Pt. 62, App. A, Article II, Section C, Paragraphs 1–3—FEMA, Federal Insurance Administration—Financial Assistance/Subsidy Arrangement, W–12050 (Aug. 13, 2012); FEMA, Memorandum For: WYO Principal Coordinators and the NFIP Direct Servicing Agent, Granting an extension of the Limited Waiver for Insurance Companies Participating in the WYO Program of the SAP found in 44 CFR Pt. 62, App. A, Article II, Section C, Paragraphs 1–3—FEMA, Federal Insurance Administration—Financial Assistance/Subsidy Arrangement and Revised Wording, W–13040 (July 9, 2013); FEMA, Memorandum For: WYO Principal Coordinators and the NFIP Direct Servicing Agent, Extension of the Limited Waiver of the SAP, W–14051 (Sept. 10, 2014); FEMA, Memorandum For: WYO Company Principal Coordinators and the NFIP Direct Servicing Agent, Extension of the Limited Waiver of the SAP, W–15044 (Sept. 17, 2015).

[5] See, National Flood Insurance Program, The Write Your Own Program Financial Control Plan Requirements and Procedures (1999), *http://bsa.nfipstat.fema.gov/manuals/fcp99jc.pdf* (last accessed April 8, 2016).

Lastly, FEMA proposes to remove the example in Section 62.23(i)(1) which references the SAP. As discussed above, FEMA has granted a limited waiver of the SAP requirement, and this example is no longer relevant. In addition, the example references Appendix A, which FEMA is proposing to remove via this notice of proposed rulemaking.

IV. Regulatory Analysis

a. Executive Order 12866, as Amended, Regulatory Planning and Review; Executive Order 13563, Improving Regulation and Regulatory Review

Executive Orders 13563 and 12866 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has not been designated a "significant regulatory action" under section 3(f) of Executive Order 12866. Accordingly, the rule has not been reviewed by the Office of Management and Budget.

FEMA is issuing a proposed rule that would remove Appendix A and B from part 62 of 44 CFR. These Appendices contain a copy of the WYO Financial Assistance/Subsidy Arrangement (Arrangement) and a summary of the "Plan to Maintain Financial Control for Business Written Under the Write Your Own Program" (Financial Control Plan), respectively. In addition, FEMA proposes to make conforming amendments to update citations to these appendices in Section 62.23.

Since 1983, FEMA has entered into a standard Arrangement with WYO companies to sell NFIP insurance policies under their own names and adjust and pay SFIP claims.[6] Since 1985, a copy of the Arrangement has been in FEMA regulations. FEMA has made frequent changes to the Arrangement, and underwent rulemaking approximately 21 times to update the copy of the Arrangement in the regulations. Its placement in the CFR is not required by statute, and is redundant and unnecessary.

FEMA proposes to remove the copy of the Arrangement in 44 CFR part 62, Appendix A, because the NFIA does not require FEMA to include a copy of the Arrangement in the CFR, and therefore, it is no longer necessary. In 1985, FEMA added a copy of the Arrangement to the regulations to inform the public of the procedural details of the WYO Program. However, since that time there have been technological advances for disseminating information to the public, and there are now more efficient ways to inform the public of the procedural details of the WYO Program. For example, FEMA now posts a copy of the Arrangement on its Web site. This serves the purpose of promoting awareness and disseminating program information, without needing to go through the rulemaking process. This rulemaking does not impose any changes to the current Arrangement with WYO Companies; FEMA believes there would not be any costs imposed on participating WYO companies as a result of this proposed rule. FEMA would continue to enter into the Arrangement with WYO companies, and make available the terms for subscription or re-subscription through **Federal Register** notice. In addition, FEMA would continue to place a copy of the Arrangement on its Web site to inform the public of the procedural details of the WYO program, and engage in negotiation with WYO companies on the terms of the Arrangement.

One of the benefits associated with this rule is enhanced flexibility for FEMA and its industry partners to negotiate operational adjustments to the Arrangement more quickly and efficiently in order to be more responsive to the needs of industry partners and the operation of the NFIP. Additionally there is less confusion generated from inconsistences that result from current practice. Finally, the elimination of the administrative burden that accompanies repeated updates to the CFR and any posted departures from the CFR onto FEMA's Web site regarding Program requirements are an additional benefit. FEMA believes there would be no economic impact associated with implementing the proposed rule.

Additionally, we are proposing to remove a summary of the Financial Control Plan; the plan itself was removed in 1985. FEMA does not anticipate any economic impacts from removing the summary.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) and Executive Order 13272 (67 FR 53461; August 16, 2002) require agency review of proposed and final rules to assess their impact on small entities. An agency must prepare an initial regulatory flexibility analysis (IRFA) unless it determines and certifies that a rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. FEMA does not believe this proposed rule will have a significant economic impact on a substantial number of small entities. However, FEMA is publishing this IRFA to aid the public in commenting on the potential small business impacts of the proposed requirements in this NPRM. FEMA invites all interested parties to submit data and information regarding the potential economic impact on small entities that would result from the adoption of this NPRM. FEMA will consider all comments received in the public comment process when making a final determination.

In accordance with the Regulatory Flexibility Act, an IFRA must contain: (1) A description of the reasons why the action by the agency is being considered; (2) A succinct statement of the objectives of, and legal basis for, the proposed rule; (3) A description—and, where feasible, an estimate of the number—of small entities to which the proposed rule will apply; (4) A description of the projected reporting, record keeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirements and the types of professional skills necessary for preparation of the report or record; (5) An identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule; and (6) A description of significant alternatives to the rule.

(1) A Description of the Reasons Why Action by the Agency Is Being Considered

FEMA proposes to remove the copy of the Arrangement, because it is no longer necessary to include a copy of the Arrangement in the CFR, and the NFIA does not require FEMA to include a copy of the Arrangement in the CFR. Moreover, by removing the copy of the Arrangement from the CFR, FEMA and its industry partners would benefit from enhanced flexibility to negotiate operational adjustments and corrections to the Arrangement more quickly and efficiently. FEMA proposes to remove the summary of the Financial Control Plan in the CFR because this information is contained in either FEMA's Financial Control Plan, or 44 CFR 62.23, and thus reprint elsewhere in the CFR is duplicative and unnecessary. Finally, FEMA proposes to make conforming amendments by removing the language in 44 CFR 62.23 where FEMA references Appendix A and Appendix B of 44 CFR part 62, for administrative efficiency because those appendices would be removed.

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[6] As of April 2016, 79 private property or casualty insurance companies participate in the Write Your Own program. Federal Emergency Management Agency, Write Your Own Flood Insurance Company List, *http://www.fema.gov/wyo_company* (last accessed April 8, 2016).

(2) A Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule

FEMA proposes to remove the copy of the Arrangement from the CFR, because the NFIA does not require FEMA to include a copy of the Arrangement in the CFR. FEMA proposes to remove the summary of the Financial Control Plan in the CFR because this information is contained in either FEMA's Financial Control Plan, or 44 CFR 62.23, and thus reprinting elsewhere in the CFR is duplicative and unnecessary. Finally, FEMA proposes to make conforming amendments to the language in 44 CFR 62.23 where FEMA references Appendix A and Appendix B of 44 CFR part 62, because those appendices would be removed.

The NFIA authorizes FEMA to "enter into any contracts, agreements, or other arrangements" with private insurance companies to utilize their facilities and services in administering the NFIP, and on such terms and conditions as may be agreed upon. *See* 42 U.S.C. 4081. Pursuant to this authority, FEMA enters into a standard Financial Assistance/Subsidy Arrangement (Arrangement) with private sector property insurers, also known as the WYO companies, to sell NFIP flood insurance policies under their own names and adjust and pay claims arising under the policy. Since the primary relationship between the Federal government and WYO Companies is one of a fiduciary nature, FEMA established the Financial Control Plan. *See* 42 U.S.C. 4071; 44 CFR 62.23(f), Part 62, App. B. The NFIA does not require FEMA to include a copy of the Arrangement or a summary of the Financial Control Plan in the CFR. It is in reference to these specific authorities to administer the NFIP, and the WYO program that is encompassed within it, that FEMA is proposing to continue to streamline operations and remove administrative hurdles to the effectiveness of these programs.

(3) A Description of and, Where Feasible, an Estimate of the Number of Small Entities to Which the Proposed Rule Will Apply

"Small entity" is defined in 5 U.S.C. 601. The term "small entity" can have the same meaning as the terms "small business", "small organization" and "small governmental jurisdiction." Section 601(3) defines a "small business" as having the same meaning as "small business concern" under Section 3 of the Small Business Act. This includes any small business concern that is independently owned and operated, and is not dominant in its field of operation. Section 601(4) defines a "small organization" as any not-for-profit enterprises that are independently owned and operated, and are not dominant in their field of operation. Section 601(5) defines small governmental jurisdictions as governments of cities, counties, towns, townships, villages, school districts, or special districts with a population of less than 50,000. No small organization or governmental jurisdiction are party to the WYO program and therefore would not be affected.

The SBA stipulates in its size standards the largest an insurance firm that is "for profit" may be and still be classified as a "small entity."[7] The small business size standards for North American Industry Classification System (NAICS) code 524126 (direct property and casualty insurance carriers) is 1,500 employees. The size standard for the four remaining applicable codes of 524210 (Insurance Agencies and Brokerages), 524113 (Direct Life Insurance Carriers), 524292 (Third Party Administration of Insurance and Pension Funds) and 524128 (Other Direct Insurance) is $7.0 million in revenue as modified by the SBA, effective February 26, 2016.

There are currently a total of 79 companies participating in the WYO Program; these 79 companies are subject to the terms of the Arrangement and the standards and requirements in the Financial Control Plan. FEMA researched each WYO company to determine the NAICS code, number of employees, and revenue for the individual companies. FEMA used the open-access database, *www.manta.com*, as well as *www.cortera.com* to find this information for the size determination. This was used as a metric of company size, compliant with the SBA thresholds based on the assigned NAICS code. Of the 79 WYO companies we found a majority of 53 firms were under code 524210 (Insurance Agencies and Brokerages), of which 20 firms or 38% were found to be small (with only one lacking full data but presumed to be small). The second largest contingent of 17 firms were under 524126 (direct property and casualty insurance carriers), of which 11 firms or 65% were found to be small (with only one missing data points but presumed to be small). Of the other three aforementioned industry codes, 524113, 524292 and 524128, there was one firm under each and none were small. Finally, six firms were specifically missing industry classifications, and FEMA believes that all but one are likely to be small. In total we found that a total of 36 of the 79 companies are below this maximum, and therefore would be considered small entities. Consequently, small entities comprise 46% of participating companies.

FEMA believes that the rule would impose no burdens on any participating company because it is removing a redundant section of the CFR and not substantively changing to the Arrangement or the Financial Control Plan itself. Therefore, FEMA does not anticipate that there would be a significant economic impact on a substantial number of small entities as a result of this proposed rule.

(4) A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Requirement and the Types of Professional Skills Necessary for Preparation of the Report or Record

The proposed rule would not impose any compliance costs on WYO companies. The WYO Arrangement in 44 CFR part 62, Appendix A is a copy of the Arrangement that FEMA enters into separately with each WYO Company. FEMA would continue to enter into the Arrangement with WYO Companies, and in accordance with the terms of the current Arrangement, FEMA would continue to notify private insurance companies and make available to companies the terms for subscription or re-subscription of the Arrangement through **Federal Register** Notice.

As the record of regulatory changes to the Arrangement shows, required changes will be implemented regardless of the regulatory process. Current channels of notification and negotiation would remain unaffected by this rule;

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[7] U.S. Small Business Administration Table of Small Business Size Standards Matched to North American Industry Classification System Codes effective February 26, 2016. Available at *https://www.sba.gov/content/small-business-size-standards*.

the only thing that would change is the elimination of the administrative burden that would accompany these changes.

As part of the Arrangement, WYO companies agree to adhere to the standards and requirements in the Financial Control Plan. The Financial Control Plan has been removed from the regulations since 1985. Removing the summary would have no economic impact. FEMA does not believe this proposed rule would have a significant economic impact on a substantial number of small entities.

(5) An Identification, to the Extent Practicable, of All Relevant Federal Rules Which May Duplicate, Overlap, or Conflict With the Proposed Rule

There are no relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule.

(6) A Description of Any Significant Alternatives to the Proposed Rule Which Accomplish the Stated Objectives of Applicable Statutes and Which Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

Given that this rule has no direct compliance costs, no less burdensome alternatives to the proposed rule are available. In the absence of this proposed rule, small entities would continue to experience the negative repercussions of inconsistences between the written Arrangement and updates that FEMA has communicated through bulletins to provide exceptions to certain parts. Small entities would also continue to experience burdens associated with alternate, less than ideal measures that have been implemented in lieu of updates to the Arrangement in the CFR.

FEMA invites all interested parties to submit data and information regarding the potential economic impact that would result from adoption of the proposals in this NPRM. FEMA will consider all comments received in the public comment process.

b. Unfunded Mandates Reform Act of 1995

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 2 U.S.C. 1531), each Federal agency "shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law)." Section 202 of the Act (2 U.S.C. 1532) further requires that "before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement" detailing the effect on State, local, and tribal governments and the private sector. The proposed rule would not result in such an expenditure, and thus preparation of such a statement is not required.

c. National Environmental Policy Act of 1969 (NEPA)

Under the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. 4321 *et seq.* an agency must prepare an environmental assessment and environmental impact statement for any rulemaking that significantly affects the quality of the human environment. FEMA has determined that this rulemaking does not significantly affect the quality of the human environment and consequently has not prepared an environmental assessment or environmental impact statement. Although rulemaking is a major federal action subject to NEPA, the list of exclusion categories at 44 CFR 10.8(d)(2)(ii) excludes the preparation, revision, and adoption of regulations from the preparation of an EA or EIS where the rule relates to actions that qualify for categorical exclusions. Administrative actions are categorically excluded from NEPA. 44 CFR 10.8(d)(2)(i). This is a rulemaking related to an administrative function. An environmental assessment will not be prepared because a categorical exclusion applies to this rulemaking and no extraordinary circumstances exist.

d. Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995 (PRA), as amended, 44 U.S.C. 3501–3520, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the agency obtains approval from the Office of Management and Budget (OMB) for the collection and the collection displays a valid OMB control number. *See* 44 U.S.C. 3506, 3507. This proposed rulemaking would call for no new collections of information under the PRA. The removal of the Arrangement from the regulation will not impact any existing information collections in that it would not substantively change any of the information collection requirements, because the information collection requirements still exist in the regulations. The existing information collections listed include citations to 44 CFR part 62 Appendices A and B. These citations will be updated in the next information collection renewal cycle. The WYO Companies will still be expected to comply with each of the information collection requirements associated with the WYO Program.

The collections associated with this regulation are as follows: (1) OMB Control Number 1660–0038, Write Your Own Company Participation Criteria, 44 CFR 62 Appendix A, which establishes the criteria to return to or participate in the WYO program; (2) OMB control number 1660–0086, the National Flood Insurance Program—Mortgage Portfolio Protection Program (MPPP), 44 CFR part 62.23 (l)(2) and Appendix B, which is a program lenders can use to bring their mortgage loan portfolios into compliance with flood insurance purchase requirements; and (3) OMB control number 1660–0020, WYO Program, 44 CFR 62.23 (f) and Appendix B, the Federal Insurance and Mitigation Administration program that requires each WYO Company to submit financial data on a monthly basis into the National Flood Insurance Program's Transaction Record Reporting and Processing Plan (TRRPP) system as referenced in 44 CFR 62.23(h)(4). Each of these collections are still required by Part 62 and will not be impacted by the removal of the Arrangement from the regulation because the existing information collections cover requirements in the regulations, not requirements in the Appendices.

e. Privacy Act/E-Government Act

Under the Privacy Act of 1974, 5 U.S.C. 552a, an agency must determine whether implementation of a proposed regulation will result in a system of records. A record is any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his/her education, financial transactions, medical history, and criminal or employment history and that contains his/her name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph. *See* 5 U.S.C. 552a(a)(4). A system of records is a group of records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. An agency cannot disclose any record which is contained in a system of records except by following specific procedures.

The E-Government Act of 2002, 44 U.S.C. 3501 note, also requires specific procedures when an agency takes action to develop or procure information technology that collects, maintains, or disseminates information that is in an identifiable form. This Act also applies when an agency initiates a new collection of information that will be collected, maintained, or disseminated using information technology if it includes any information in an identifiable form permitting the physical or online contacting of a specific individual. A Privacy Threshold Analysis was completed. This rule does not require a Privacy Impact Analysis or System of Records Notice at this time.

f. Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, 65 FR 67249, November 9, 2000, applies to agency regulations that have Tribal implications, that is, regulations that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. Under this Executive Order, to the extent practicable and permitted by law, no agency shall promulgate any regulation that has Tribal implications, that imposes substantial direct compliance costs on Indian Tribal governments, and that is not required by statute, unless funds necessary to pay the direct costs incurred by the Indian Tribal government or the Tribe in complying with the regulation are provided by the Federal Government, or the agency consults with Tribal officials.

This proposed rule does not have Tribal implications. Currently, Indian Tribal governments cannot participate in the WYO Program as WYO companies, and thus are not affected by this proposed rule. To participate in the WYO program, a company must be a licensed property or casualty insurance company and meet the requirements in FEMA regulations at 44 CFR 62.24.

g. Executive Order 13132, Federalism

Executive Order 13132, Federalism, 64 FR 43255, August 10, 1999, sets forth principles and criteria that agencies must adhere to in formulating and implementing policies that have federalism implications, that is, regulations that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Federal agencies must closely examine the statutory authority supporting any action that would limit the policymaking discretion of the States, and to the extent practicable, must consult with State and local officials before implementing any such action.

FEMA has reviewed this proposed rule under Executive Order 13132 and has determined that this rule does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, and therefore does not have federalism implications as defined by the Executive Order. This rule does not have federalism implications, because participation as a WYO Company is voluntary and does not affect State policymaking discretion. Moreover, currently, States cannot participate in the WYO Program as WYO companies, and thus are not affected by this proposed rule. To participate in the WYO program, a company must be a licensed property or casualty insurance company and meet the requirements in FEMA regulations at 44 CFR 62.24. In accordance with Section 6 of Executive Order 13132, FEMA determines that this rule will not have federalism implications sufficient to warrant the preparation of a federalism impact statement.

h. Executive Order 11988, Floodplain Management

Pursuant to Executive Order 11988, each agency is required to provide leadership and take action to reduce the risk of flood loss, to minimize the impact of floods on human safety, health and welfare, and to restore and preserve the natural and beneficial values served by floodplains in carrying out its responsibilities for (1) acquiring, managing, and disposing of Federal lands and facilities; (2) providing Federally undertaken, financed, or assisted construction and improvements; and (3) conducting Federal activities and programs affecting land use, including but not limited to water and related land resources planning, regulating, and licensing activities. In carrying out these responsibilities, each agency must evaluate the potential effects of any actions it may take in a floodplain; to ensure that its planning programs and budget requests reflect consideration of flood hazards and floodplain management; and to prescribe procedures to implement the policies and requirements of the Executive Order.

Before promulgating any regulation, an agency must determine whether the proposed regulations will affect a floodplain(s), and if so, the agency must consider alternatives to avoid adverse effects and incompatible development in the floodplain(s). If the head of the agency finds that the only practicable alternative consistent with the law and with the policy set forth in Executive Order 11988 is to promulgate a regulation that affects a floodplain(s), the agency must, prior to promulgating the regulation, design or modify the regulation in order to minimize potential harm to or within the floodplain, consistent with the agency's floodplain management regulations and prepare and circulate a notice containing an explanation of why the action is proposed to be located in the floodplain. The changes proposed in this rule would not have an effect on land use, floodplain management, or wetlands.

i. Executive Order 11990, Protection of Wetlands

Pursuant to Executive Order 11990, each agency must provide leadership and take action to minimize the destruction, loss or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands in carrying out the agency's responsibilities for (1) acquiring, managing, and disposing of Federal lands and facilities; and (2) providing Federally undertaken, financed, or assisted construction and improvements; and (3) conducting Federal activities and programs affecting land use, including but not limited to water and related land resources planning, regulating, and licensing activities. Each agency, to the extent permitted by law, must avoid undertaking or providing assistance for new construction located in wetlands unless the head of the agency finds (1) that there is no practicable alternative to such construction, and (2) that the proposed action includes all practicable measures to minimize harm to wetlands which may result from such use. In making this finding the head of the agency may take into account economic, environmental and other pertinent factors.

In carrying out the activities described in the Executive Order, each agency must consider factors relevant to a proposal's effect on the survival and quality of the wetlands. Among these factors are: Public health, safety, and welfare, including water supply, quality, recharge and discharge; pollution; flood and storm hazards; and sediment and erosion; maintenance of natural systems, including conservation and long term productivity of existing flora and fauna, species and habitat diversity and stability, hydrologic utility, fish, wildlife, timber, and food and fiber resources; and other uses of wetlands in the public interest, including recreational, scientific, and cultural uses. The changes proposed in this rule would not have an effect on land use, floodplain management, or wetlands.

j. Executive Order 12898, Environmental Justice

Pursuant to Executive Order 12898, —Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, February 16, 1994, as amended by Executive Order 12948, 60 FR 6381, February 1, 1995, FEMA incorporates environmental justice into its policies and programs. The Executive Order requires each Federal agency to conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures that those programs, policies, and activities do not have the effect of excluding persons from participation in programs, denying persons the benefits of programs, or subjecting persons to discrimination because of race, color, or national origin.

This rulemaking will not have a disproportionately high or adverse effect on human health or the environment. This rulemaking will not have a disproportionately high or adverse effect on human health or the environment. Therefore the requirements of Executive Order 12898 do not apply to this rule.

k. Congressional Review of Agency Rulemaking

Under the Congressional Review of Agency Rulemaking Act (CRA), 5 U.S.C. 801–808, before a rule can take effect, the Federal agency promulgating the rule must submit to Congress and to the Government Accountability Office (GAO) a copy of the rule, a concise general statement relating to the rule, including whether it is a major rule, the proposed effective date of the rule, a copy of any cost-benefit analysis, descriptions of the agency's actions under the Regulatory Flexibility Act and the Unfunded Mandates Reform Act, and any other information or statements required by relevant executive orders.

FEMA will send this rule to the Congress and to GAO pursuant to the CRA if the rule is finalized. The rule is not a major rule within the meaning of the CRA. It will not have an annual effect on the economy of $100,000,000 or more, it will not result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions, and it will not have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

List of Subjects in 44 CFR Part 62

Claims, Flood insurance, and Reporting and recordkeeping requirements.

For the reasons discussed in the preamble, the Federal Emergency Management Agency proposes to amend 44 CFR Chapter I as follows:

PART 62—SALE OF INSURANCE AND ADJUSTMENT OF CLAIMS

■ 1. The authority citation for part 62 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 43 FR 41943, 3 CFR, 1978 Comp., p. 329; E.O. 12127 of Mar. 31, 1979, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

■ 2. Amend § 62.23 by:

■ a. Revising the last sentence of paragraph (a);

■ b. Revising the second sentence of paragraph (f);

■ c. Revising paragraph (i)(1); and

■ d. Revising the last sentence of paragraph (l)(2).

§ 62.23 [Amended]

(a), * * * Arrangements entered into by WYO Companies or other insurers under this subpart must be in the form and substance of the standard arrangement, titled "Financial Assistance/Subsidy Arrangement."

* * * * *

(f) * * * In furtherance of this end, the Federal Insurance Administrator has established "A Plan to Maintain Financial Control for Business Written Under the Write Your Own Program." * * *

* * * * *

(i) * * *

(1) WYO Companies will adjust claims in accordance with general Company standards, guided by NFIP Claims manuals. The Arrangement provides that claim adjustments shall be binding upon the FIA.

* * * * *

(l) * * *

(2) * * * Participating WYO Companies must also maintain evidence of compliance with paragraph (l)(3) of this section for review during the audits and reviews required by the WYO Financial Control Plan.

* * * * *

Appendix A [Removed]

■ 3. Remove Appendix A to Part 62.

Appendix B [Removed]

■ 4. Remove Appendix B to Part 62.

Dated: May 12, 2016.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2016–11701 Filed 5–20–16; 8:45 am]

BILLING CODE 9110–11–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Part 1250

[Docket No. EP 724 (Sub-No. 4)]

United States Rail Service Issues—Performance Data Reporting

AGENCY: Surface Transportation Board, Department of Transportation.

ACTION: Supplemental Notice of Proposed Rulemaking; correction.

SUMMARY: This document corrects the Supplemental Notice of Proposed Rulemaking (SNPR) served on April 29, 2016, and published in the **Federal Register** on May 5, 2016, (81 FR 27069), titled "United States Rail Service Issues—Performance Data Reporting."

DATES: The SNPR is corrected as of May 23, 2016. Comments on the SNPR are due by May 31, 2016. Reply comments are due by June 28, 2016.

FOR FURTHER INFORMATION CONTACT: Allison Davis at (202) 245–0378. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877–8339.

SUPPLEMENTARY INFORMATION: A corrected decision was served on May 13, 2016, and is available on the Surface Transportation Board's Web site at *http://www.stb.dot.gov.* In the corrected decision, the citation to 49 U.S.C. 721 in footnote 4 was corrected to 49 U.S.C. 722(c). On page 19, lines 4–5, the statement "all six of the Class I carriers" was corrected to "all seven of the Class

I carriers." In Table 1 on page 24, "60 or more railcars" was corrected to "50 or more railcars." On page 30, Request No. 12, the statement "versus cars actually and on constructive placement" was corrected to "versus cars actually placed and on constructive placement." A number of minor typographical errors were also corrected in the decision.

In the Supplemental Notice of Proposed Rulemaking beginning on page 81 FR 27069 in the issue of May 5, 2016 of the **Federal Register** make the following corrections:

- In the preamble, on page 27070, in 1st column, in footnote 3, correct "49 U.S.C. 721" to read "49 U.S.C. 722(c)".
- In the preamble, on page 27076, in the 3rd column, correct the statement "all six of the Class I carriers" to read "all seven of the Class I carriers."
- In the preamble, on page 27079, in Table 1, on the 3rd line correct the statement "60 or more railcars" to "50 or more railcars."
- In the amendatory language, on page 27081, in the 3rd column, in the proposed rule 49 CFR 1250.2(12)(ii) correct the statement "versus cars actually and on constructive placement" to "versus cars actually placed and on constructive placement."

Additional information is contained in the Board's decision, which is available on our Web site at *http://www.stb.dot.gov.*

Decided: May 13, 2016.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.

Kenyatta Clay,

Clearance Clerk.

[FR Doc. 2016–11805 Filed 5–20–16; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 160301167–6167–01]

RIN 0648–BF89

Fisheries of the Northeastern United States; Recreational Management Measures for the Summer Flounder, Scup, and Black Sea Bass Fisheries; Fishing Year 2016

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes management measures for the 2016 summer flounder, scup, and black sea bass recreational fisheries. NMFS is also proposing a change to the commercial scup incidental possession limit, and two minor corrections to the summer flounder minimum mesh size regulations. The implementing regulations for these fisheries require NMFS to publish recreational measures for the fishing year and to provide an opportunity for public comment. The intent of these measures is to constrain recreational catch to established limits and prevent overfishing of the summer flounder, scup, and black sea bass resources. The intent of the commercial scup regulatory change is to reduce unnecessary discards by allowing more incidentally caught scup to be retained by vessels. The regulatory corrections are intended to clarify the original purpose of the regulation.

DATES: Comments must be received by 5 p.m. local time, on June 7, 2016.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2016–0029, by either of the following methods:

Electronic submission: Submit all electronic public comments via the Federal e-Rulemaking Portal.

- Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2016-0029,*
- Click the "Comment Now!" icon, complete the required fields
- Enter or attach your comments.

—OR—

Mail: Submit written comments to John Bullard, Regional Administrator, Greater Atlantic Region, 55 Great Republic Drive, Gloucester, MA 01930.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous).

Copies of the Supplemental Information Report (SIR) and other supporting documents for the recreational harvest measures are available from Dr. Christopher M. Moore, Executive Director, Mid-Atlantic Fishery Management Council, Suite 201, 800 N. State Street, Dover, DE 19901. The recreational harvest measures document is also accessible via the Internet at: *http://www.greateratlantic.fisheries.noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Elizabeth Scheimer, Fisheries Management Specialist, (978) 281–9236.

SUPPLEMENTARY INFORMATION:

General Background

The summer flounder, scup, and black sea bass fisheries are managed cooperatively under the provisions of the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan (FMP) developed by the Mid-Atlantic Fishery Management Council (Council) and the Atlantic States Marine Fisheries Commission (Commission), in consultation with the New England and South Atlantic Fishery Management Councils. The management units specified in the FMP include summer flounder (*Paralichthys dentatus*) in U.S. waters of the Atlantic Ocean from the southern border of North Carolina northward to the U.S./Canada border, and scup (*Stenotomus chrysops*) and black sea bass (*Centropristis striata*) in U.S. waters of the Atlantic Ocean from 35°13.3′ N. lat. (the approximate latitude of Cape Hatteras, North Carolina). States manage these three species within 3 nautical miles (4.83 km) of their coasts, under the Commission's plan for summer flounder, scup, and black sea bass. The applicable species-specific Federal regulations govern vessels and individual fishermen fishing in Federal waters of the exclusive economic zone (EEZ), as well as vessels possessing a summer flounder, scup, or black sea bass Federal charter/party vessel permit, regardless of where they fish.

Recreational Management Measures Background

The Council process for recommending recreational management measures to NMFS for rulemaking is generically described below. All meetings are open to the public and the materials utilized during such meetings, as well as any documents created to summarize the meeting results, are public information and posted on the Council's Web site (*www.mafmc.org*) or are available from the Council by request. Therefore, extensive background on the 2016 recreational management measures recommendation process is not repeated in this preamble.

The FMP established monitoring committees for the three fisheries, consisting of representatives from the

Commission, the Council, state marine fishery agency representatives from Massachusetts to North Carolina, and NMFS. The FMP's implementing regulations require the monitoring committees to review scientific and other relevant information annually. The objective of this review is to recommend management measures to the Council that will constrain landings within the recreational harvest limits established for the three fisheries for the upcoming fishing year. The FMP limits the choices for the types of measures to minimum fish size, per angler possession limit, and fishing season.

The Council's Demersal Species Committee and the Commission's Summer Flounder, Scup, and Black Sea Bass Management Board (Board) then consider the monitoring committees' recommendations and any public comment in making their recommendations to the Council and the Commission, respectively. The Council reviews the recommendations of the Demersal Species Committee, makes its own recommendations, and forwards them to NMFS for review. The Commission similarly adopts recommendations for the states. NMFS is required to review the Council's recommendations to ensure that they are consistent with the targets specified for each species in the FMP and all applicable laws and Executive Orders before ultimately implementing measures for Federal waters. Commission measures are final at the time they are adopted.

In this rule, NMFS proposes management measures for the 2016 summer flounder, scup, and black sea bass recreational fisheries consistent with the recommendations of the Council. All minimum fish sizes discussed are total length measurements of the fish, *i.e.*, the straight-line distance from the tip of the snout to the end of the tail while the fish is lying on its side. For black sea bass, total length measurement does not include the caudal fin tendril. All possession limits discussed below are per person per trip.

Typically, the Council and Commission consider modifications to all of the Federal commercial management measures in conjunction with the specifications. In 2015, the Council and Commission postponed decision making on changes to the scup commercial measures until a more thorough analysis could be completed. After considering the full suite of commercial management measures in Federal waters, the Council recommends, and this rule proposes, changing the commercial scup incidental possession limit from 500 lb (227 kg) to 1,000 lb (454 kg) from November 1, 2016, through April 30, 2017. This incidental possession limit applies to vessels using mesh smaller than 5.0 inches (12.7 cm).

Proposed 2016 Recreational Management Measures

NMFS is proposing the following measures that would apply in the Federal waters of the EEZ. These measures apply to all federally permitted party/charter vessels with applicable summer flounder, scup, or black sea bass permits, regardless of where they fish, unless the state in which they land implements measures that are more restrictive. These measures are intended to achieve, but not exceed, the previously-established recreational harvest limits for these fisheries (December 28, 2015; 80 FR 80689). For summer flounder, we are proposing the use of state-by-state or regional conservation equivalency measures, which are the status quo measures, and no changes to the scup or black sea bass recreational management measures. Although unlikely, given the Board's February 2016 decisions on black sea bass measures, NMFS may implement more restrictive black sea bass measures for Federal waters if states fail to implement measures that, when paired with the Council's recommended measures, provide the necessary conservation to ensure the 2016 recreational harvest limit will not be exceeded. These measures, as recommended by the Council, would be a 14-inch (35.6-cm) minimum fish size, a 3-fish per person possession limit, and an open season of July 15–September 15, 2016.

Summer Flounder Recreational Management Measures

NMFS proposes to implement the Council and Commission's recommendation to use conservation equivalency to manage the 2016 summer flounder recreational fishery. The 2016 recreational harvest limit for summer flounder is 5.42 million lb (2,457 mt) and projected landings for 2015 are approximately 4.62 million lb (2,096 mt). These 2015 projected landings are based on preliminary Marine Recreational Information Program estimates through Wave 6 (November and December 2015). As a result, maintaining the 2015 measures is expected to effectively constrain the 2016 recreational landings and prevent the recreational harvest limit from being exceeded.

Conservation equivalency, as established by Framework Adjustment 2 (July 29, 2001; 66 FR 36208), allows each state to establish its own recreational management measures (possession limits, minimum fish size, and fishing seasons) to achieve its state harvest limit partitioned by the Commission from the coastwide recreational harvest limit, as long as the combined effect of all of the states' management measures achieves the same level of conservation as would Federal coastwide measures. Framework Adjustment 6 (July 26, 2006; 71 FR 42315) allowed states to form regions for conservation equivalency in order to minimize differences in regulations for anglers fishing in adjacent waters.

The Council and Board annually recommend that either state- or region-specific recreational measures be developed (conservation equivalency) or that coastwide management measures be implemented to ensure that the recreational harvest limit will not be exceeded. Even when the Council and Board recommend conservation equivalency, the Council must specify a set of coastwide measures that would apply if conservation equivalency is not approved for use in Federal waters.

When conservation equivalency is recommended, and following confirmation that the proposed state or regional measures developed through the Commission's technical and policy review processes achieve conservation equivalency, NMFS may waive the permit condition found at § 648.4(b), which requires Federal permit holders to comply with the more restrictive management measures when state and Federal measures differ. In such a situation, federally permitted summer flounder charter/party permit holders and individuals fishing for summer flounder in the EEZ would then be subject to the recreational fishing measures implemented by the state in which they land summer flounder, rather than the coastwide measures.

In addition, the Council and the Board must recommend precautionary default measures when recommending conservation equivalency. The Commission would require adoption of the precautionary default measures by any state that either does not submit a summer flounder management proposal to the Commission's Summer Flounder Technical Committee, or that submits measures that would exceed the Commission-specified harvest limit for that state.

Much of the conservation equivalency measures development process happens at both the Commission and the individual state level. The selection of appropriate data and analytical techniques for technical review of potential state conservation equivalent measures and the process by which the Commission evaluates and recommends proposed conservation equivalent measures is wholly a function of the Commission and its individual member states. Individuals seeking information regarding the process to develop specific state measures or the Commission process for technical evaluation of proposed measures should contact the marine fisheries agency in the state of interest, the Commission, or both.

The Commission has implemented an addendum to its Summer Flounder FMP (Addendum XXVII) to continue regional conservation equivalency for fishing year 2016. The Commission has adopted the following regions: (1) Massachusetts; (2) Rhode Island; (3) Connecticut and New York; (4) New Jersey; (4) Delaware, Maryland, and Virginia; and (5) North Carolina. In order to provide the maximum amount of flexibility and to continue to adequately address the state-by-state differences in fish availability, each state in a region is required by the Council and Commission to establish fishing seasons of the same length, with identical minimum fish sizes and possession limits. The Commission will need to certify that these measures, in combination, are the conservation equivalent of coastwide measures that would be expected to result in the recreational harvest limit being achieved, but not exceeded. More information on this addendum is available from the Commission (*www.asmfc.org*).

Once the states and regions select their final 2016 summer flounder management measures through their respective development, analytical, and review processes and submit them to the Commission, the Commission will conduct further review and evaluation of the submitted proposals, ultimately notifying NMFS as to which proposals have been approved or disapproved. NMFS has no overarching authority in the development of state or Commission management measures, but is an equal participant along with all the member states in the review process. NMFS retains the final authority either to approve or to disapprove the use of conservation equivalency in place of the coastwide measures in Federal waters, and will publish its determination as a final rule in the **Federal Register** to establish the 2016 recreational measures for these fisheries.

States that do not submit conservation equivalency proposals, or whose proposals are disapproved by the Commission, will be required by the Commission to adopt the precautionary default measures. In February 2016, the Commission's Summer Flounder Board convened and approved a suite of measures and/or analytical techniques for measures development that should achieve conservation equivalency. Thus, it is unlikely that the precautionary default measures will be necessary for 2016. However, if states are initially assigned precautionary default measures, they may subsequently receive Commission approval of revised state measures. In that case, NMFS would publish a notice in the **Federal Register** announcing a waiver of the permit condition at § 648.4(b).

The 2016 precautionary default measures recommended by the Council and Board are for a 20.0-inch (50.8-cm) minimum fish size, a possession limit of two fish, and an open season of May 1 through September 30, 2016.

In this action, NMFS proposes to implement conservation equivalency with a precautionary default backstop, as previously outlined, for states that either fail to submit conservation equivalent measures or whose measures are not approved by the Commission. NMFS proposes the alternative of coastwide measures (18-inch (45.7-cm) minimum size, 4-fish possession limit, May 1–September 30 open fishing season), if conservation equivalency is not approved in the final rule.

Scup Recreational Management Measures

The 2016 scup recreational harvest limit is 6.09 million lb (2,763 mt) and 2015 recreational landings are currently estimated at 4.88 million lb (2,214 mt). The Council recommended maintaining the existing management measures, as no changes are needed to ensure the 2016 recreational harvest limit is not exceeded, and further liberalization of the management measures is not requested or advisable. As a result, no changes to the current scup management measures (9-inch or 22.9 cm minimum fish size, 50-fish per person possession limit, and year-round season) are proposed.

Black Sea Bass Recreational Management Measures

The 2016 black sea bass recreational harvest limit is 2.82 million lb (1,280 mt), while the 2015 projected landings are 3.62 million lb (1,642 mt). These 2015 projected landings are based on preliminary Marine Recreational Information Program estimates through Wave 6 (November and December 2015). 2016 management measures must reduce landings by 22-percent relative to 2015 in order to constrain catch within the 2016 recreational harvest limit. Recreational black sea bass catch occurs primarily in state waters in the states of New Jersey through Massachusetts (*i.e.*, the northern region). As such, the Council recommends maintaining the existing black sea bass regulations for Federal waters, and implementing the necessary reduction through changes in state waters measures.

Since 2011, the management measures in the northern region have been more restrictive than in Federal waters. The northern states, through the Commission process, are expected to implement measures to achieve a 22-percent reduction in landings from each state. The southern region states (Delaware through Cape Hatteras, North Carolina) are expected to implement state waters measures that are identical to the proposed Federal measures. The northern states' reduction, in combination with the Council's recommendation of maintaining the status quo measures in Federal waters and state waters from Delaware to North Carolina, are intended to achieve, but not exceed, the recreational harvest limit and recreational annual catch limit in 2016.

Accountability measures for the black sea bass recreational fishery utilize a rolling three-year average comparison of catch to the average of the same three years' ACLs. Because the average catch from 2012 through 2014 exceeds the average annual catch limit for those years by 37.9 percent, an accountability measure is applicable to the 2016 fishery. The 2016 accountability measures are the same as those implemented in 2015 (12.5-inch (31.8-cm) minimum size, 15-fish possession limit, and 201-day fishing season). Continuing these regulations preserves the accountability measures that were applied last year; as such, no further accountability measures are necessary for 2015.

We are proposing no changes to the current Federal waters measures (12.5-inch (31.8-cm) minimum size, 15-fish possession limit, and open seasons of May 15–September 21 and October 22–December 31), consistent with the Council's recommendation. These measures maintain the accountability measures implemented in 2015. This proposal is contingent upon the northern region, established under the Commission's Addendum XXVII, implementing the required reduction in their state regulations. If the northern region's measures do not meet the required reduction, NMFS is proposing the Council's default recommendation of a 14-inch (35.6-cm) minimum size, a 3-fish possession limit, and an open season of July 15–September 15 (*i.e.,* a 63-day fishing season). The Council and NMFS expect, based on February 2016 action by the Commission's black sea bass Board, that these default measures will not be necessary.

Commercial Scup Incidental Possession Limit Change

The Council initiated a review of the scup commercial management measures in 2015 and is recommending an increase in the incidental possession limit in the winter season. Currently, the regulations require vessels retaining more than 500 lb (227 kg) of scup from November 1 through April 30, or more than 200 lb (91 kg) from May 1 through October 31, to use mesh larger than 5 inches (12.7 cm). The Council is recommending, and this rule proposes, to raise the incidental limit to 1,000 lb (454 kg) for the November–April season for vessels using mesh smaller than 5 inches (12.7 cm) to minimize regulatory discards without compromising the scup stock. Vessels using mesh larger than 5 inches (12.7 cm) may continue to land up to the targeted commercial fishery possession limit according to the applicable Federal and state rules.

Additional Regulatory Changes

This rule would also correct two errors in the commercial summer flounder regulations.

The summer flounder minimum mesh size regulations at § 648.108(a)(1) require that any vessel landing or possessing more than 100 lb (45 kg) of summer flounder from May 1 through October 31, or 200 lb (91 kg) of summer flounder from November 1 through April 30, use at least 5.5-inch (14-cm) diamond or 6.0-inch (15-cm) square mesh "throughout the body, extension(s), and codend portion of the net." However, the turtle excluding device (TED) regulations require summer flounder trawls fishing in the sea turtle protection area to have a TED extension with webbing no larger than 3.5 inches (9-cm). This rule would eliminate the conflict between these two regulations by specifying that the minimum mesh size restrictions do not apply to extensions needed to comply with the TED regulations.

The flynet program exemption from the summer flounder minimum mesh requirements can be found at § 648.108(b)(2)(i)–(iii). The Regional Administrator's authority to terminate the exemption after review is incorrectly listed at § 648.108(b)(3) and should be referenced at § 648.108(b)(2)(iv), which this rule proposes to do.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the Assistant Administrator has determined that this proposed rule is consistent with the Summer Flounder, Scup, and Black Sea Bass FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

The Chief Council for Regulation of the Department of Commerce certified to the Chief Council for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities.

The Council conducted an evaluation of the potential socioeconomic impacts of the proposed measures in conjunction with a SIR. Because no regulatory changes are proposed that would affect the recreational black sea bass or scup fisheries, they are not considered in the evaluation. There were 547 federally permitted summer flounder charter/party vessels, all of which are considered "small" by the Small Business Administration's size standards. The commercial scup incidental possession limit change could potentially affect 649 commercial entities that had revenues generated from scup during the 2012–2014 period. Of these, 642 entities are categorized as small and 7 are categorized as large. Scup represented approximately 0.06 percent of the average receipts of the small entities considered and 0.34 percent of the average receipts of the large entities considered over the 2012–2014 time period.

The proposed measure would continue the use of conservation equivalency for summer flounder, maintain the existing scup and black sea bass recreational management measures, and increase the commercial incidental scup possession limit from 500 lb (227 kg) to 1,000 lb (454 kg). The proposed action would result in status quo measures for all three recreational fisheries in Federal waters. Further, the scup possession limit change is intended to allow vessels catching scup in the prosecution of other fisheries to keep 500 lb (227 kg) more than they are currently allowed, rather than discarding them. This is not likely to change fishing behavior, but could result in a slightly positive economic impact for those vessels. Collectively, analysis conducted by the Council indicates that these measures would have a minimal, potentially slight positive impact on regulated entities.

Because this rule will not have a significant economic impact on a substantial number of small entities, an initial regulatory flexibility analysis is not required and none has been prepared.

There are no new reporting or recordkeeping requirements contained in any of the alternatives considered for this action.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: May 18, 2016.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 648 is proposed to be amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

■ 1. The authority citation for part 648 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

■ 2. Section 648.107, introductory text to paragraph (a) is revised to read as follows:

§ 648.107 Conservation equivalent measures for the summer flounder fishery.

(a) The Regional Administrator has determined that the recreational fishing measures proposed to be implemented by the states of Maine through North Carolina for 2016 are the conservation equivalent of the season, minimum size, and possession limit prescribed in §§ 648.102, 648.103, and 648.105(a), respectively. This determination is based on a recommendation from the Summer Flounder Board of the Atlantic States Marine Fisheries Commission.

* * * * *

■ 3. In § 648.108, paragraph (b)(3) is redesignated as paragraph (b)(2)(iv) and paragraph (a)(1) is revised to read as follows:

§ 648.108 Summer flounder gear restrictions.

(a) *General.* (1) Otter trawlers whose owners are issued a summer flounder permit and that land or possess 100 lb (45.4 kg) or more of summer flounder from May 1 through October 31, or 200 lb (90.7 kg) or more of summer flounder from November 1 through April 30, per trip, must fish with nets that have a minimum mesh size of 5.5-inch (14.0-cm) diamond or 6.0-inch (15.2-cm) square mesh applied throughout the body, extension(s), and codend portion of the net, except as required in a TED extension, in accordance with § 223.206(d)(2)(iii) of this title.

* * * * *

■ 4. In § 648.125, paragraph (a)(1) is revised to read as follows:

§ 648.125 Scup gear restrictions.

(a) *Trawl vessel gear restrictions*—(1) *Minimum mesh size.* No owner or operator of an otter trawl vessel that is issued a scup moratorium permit may possess 1,000 lb (454 kg) or more of scup from November 1 through April 30, or 200 lb (91 kg) or more of scup from May 1 through October 31, unless fishing with nets that have a minimum mesh size of 5.0-inch (12.7-cm) diamond mesh, applied throughout the codend for at least 75 continuous meshes forward of the terminus of the net, and all other nets are stowed and not available for immediate use as defined in § 648.2.

* * * * *

[FR Doc. 2016–12076 Filed 5–20–16; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 81, No. 99
Monday, May 23, 2016

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Notice of Public Meeting of the Assembly of the Administrative Conference of the United States

AGENCY: Administrative Conference of the United States.

ACTION: Notice.

SUMMARY: Pursuant to the Federal Advisory Committee Act (5 U.S.C. App.), the Assembly of the Administrative Conference of the United States will hold a meeting to consider two proposed recommendations and to conduct other business. This meeting will be open to the public.

DATES: The meeting will take place on Friday, June 10, 2016, 9:00 a.m. to 12:30 p.m. The meeting may adjourn early if all business is finished.

ADDRESSES: The meeting will be held at the Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581 (Main Conference Room).

FOR FURTHER INFORMATION CONTACT: Shawne McGibbon, General Counsel (Designated Federal Officer), Administrative Conference of the United States, Suite 706 South, 1120 20th Street NW., Washington, DC 20036; Telephone 202–480–2088; email *smcgibbon@acus.gov.*

SUPPLEMENTARY INFORMATION: The Administrative Conference of the United States makes recommendations to federal agencies, the President, Congress, and the Judicial Conference of the United States regarding the improvement of administrative procedures (5 U.S.C. 594). The membership of the Conference, when meeting in plenary session, constitutes the Assembly of the Conference (5 U.S.C. 595).

Agenda: The Assembly will consider two proposed recommendations as described below:

Consumer Complaint Databases. This proposed recommendation encourages agencies that make consumer complaints publicly available through online databases or downloadable data sets to adopt and publish written policies governing the dissemination of such information to the public. These policies should inform the public of the source and limitations of the information and permit entities publicly identified to respond or request corrections or retractions.

Aggregation of Similar Claims in Agency Adjudication. This proposed recommendation provides guidance to agencies on the use of aggregation techniques to resolve similar claims in adjudications. It sets forth procedures for determining whether aggregation is appropriate. It also considers what kinds of aggregation techniques should be used in certain cases and offers guidance on how to structure the aggregation proceedings to promote both efficiency and fairness.

Additional information about the proposed recommendations and the order of the agenda, as well as other materials related to the meeting, can be found at the 65th Plenary Session page on the Conference's Web site: *https://www.acus.gov/meetings-and-events/plenary-meeting/65th-plenary-session.*

Public Participation: The Conference welcomes the attendance of the public at the meeting, subject to space limitations, and will make every effort to accommodate persons with disabilities or special needs. Members of the public who wish to attend in person are asked to RSVP online at the 65th Plenary Session Web page listed above, no later than two days before the meeting, in order to facilitate entry. Members of the public who attend the meeting may be permitted to speak only with the consent of the Chairman and the unanimous approval of the members of the Assembly. If you need special accommodations due to disability, please inform the Designated Federal Officer noted above at least 7 days in advance of the meeting. The public may also view the meeting through a live webcast, which will be available at: *https://livestream.com/ACUS/65thPlenary.*

Written Comments: Persons who wish to comment on any of the proposed recommendations may do so by submitting a written statement either online by clicking "Submit a Comment" on the 65th Plenary Session Web page listed above or by mail addressed to: June 2016 Plenary Session Comments, Administrative Conference of the United States, Suite 706 South, 1120 20th Street NW., Washington, DC 20036. Written submissions must be received no later than 10:00 a.m. (EDT), Monday, June 6, to assure consideration by the Assembly.

Dated: May 18, 2016.

Shawne McGibbon,

General Counsel.

[FR Doc. 2016–12075 Filed 5–20–16; 8:45 am]

BILLING CODE 6110–01–P

DEPARTMENT OF AGRICULTURE

Forest Service

Prince of Wales Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Prince of Wales Resource Advisory Committee (RAC) will meet in Craig, Alaska. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with Title II of the Act. RAC information can be found at the following Web site: *https://fsplaces.fs.fed.us/fsfiles/unit/wo/secure_rural_schools.nsf.*

DATES: The meeting will be held June 20, 2016, at 10:00 a.m.

All RAC meetings are subject to cancellation. For status of meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: The meeting will be held at Craig Ranger District, 504 9th Street, Craig, Alaska. If you wish to attend via teleconference, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION**. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at the Craig Ranger District. Please call ahead to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Amy Manuel, RAC Coordinator, by phone at 907–228–6200 or via email at *amymmanuel@fs.fed.us.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to review and recommend projects authorized under Title II of the Act.

The meeting is open to the public. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by June 15, 2016, to be scheduled on the agenda. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. Written comments and requests for time to make oral comments must be sent to Matthew Anderson, Designated Federal Officer, P.O. Box 500, Craig, Alaska 99921; by email to *mdanderson@fs.fed.us,* or via facsimile to 907–826–2972.

Meeting Accommodations: If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpreting, assistive listening devices, or other reasonable accommodation. For access to the facility or proceedings, please contact the person listed in the section titled **FOR FURTHER INFORMATION CONTACT**. All reasonable accommodation requests are managed on a case by case basis.

Dated: May 4, 2016.

Matt D. Anderson,

District Ranger.

[FR Doc. 2016–11796 Filed 5–20–16; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

Prince of Wales Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Prince of Wales Resource Advisory Committee (RAC) will meet in Craig, Alaska. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with Title II of the Act. RAC information can be found at the following Web site: *https://fsplaces.fs.fed.us/fsfiles/unit/wo/secure_rural_schools.nsf.*

DATES: The meeting will be held June 27, 2016, at 10:00 a.m.

All RAC meetings are subject to cancellation. For status of meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: The meeting will be held at Craig Ranger District, 504 9th Street, Craig, Alaska. If you wish to attend via teleconference, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION**. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at the Craig Ranger District. Please call ahead to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Amy Manuel, RAC Coordinator, by phone at 907–228–6200 or via email at *amymmanuel@fs.fed.us.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to review and recommend projects authorized under Title II of the Act.

The meeting is open to the public. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by June 22, 2016, to be scheduled on the agenda. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. Written comments and requests for time to make oral comments must be sent to Matthew Anderson, Designated Federal Officer, P.O. Box 500, Craig, Alaska 99921; by email to *mdanderson@fs.fed.us,* or via facsimile to 907–826–2972.

Meeting Accommodations: If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpreting, assistive listening devices, or other reasonable accommodation. For access to the facility or proceedings, please contact the person listed in the section titled **FOR FURTHER INFORMATION CONTACT**. All reasonable accommodation requests are managed on a case by case basis.

Dated: May 4, 2016.

Matt D. Anderson,

District Ranger, DFO.

[FR Doc. 2016–11794 Filed 5–20–16; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

Eastern Arizona Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Eastern Arizona Resource Advisory Committee (RAC) will meet in Springerville, Arizona. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343) (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with title II of the Act. The meeting is open to the public. The purpose of the meeting is to review and recommend projects authorized under title II of the Act.

DATES: The meeting will be held July 12, 2016 beginning at 9 a.m. until 4 p.m., and continuing if necessary, on July 13, 2016 at 9 a.m. until approximately 4 p.m.

All RAC meetings are subject to cancellation. For status of meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: The meeting will be held at the Apache-Sitgreaves National Forests Supervisor's Office conference room, located at 30 South Chiricahua Drive, Springerville, Arizona 85938.

Written comments may be submitted as described under **SUPPLEMENTARY**

INFORMATION. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at the Apache-Sitgreaves National Forests upervisor's Office, 30 South Chiricahua Drive, Springerville, Arizona 85938. Please call ahead to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Marta Call, RAC Program Coordinator, Eastern Arizona Resource Advisory Committee by phone at 928–333–6336 or via email at *martaicall@fs.fed.us.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: Additional RAC information, including the meeting agenda and the meeting summary/minutes can be found at the following Web site: *http://www.fs.usda.gov/asnf.* The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by June to be scheduled on the agenda. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. Written comments and requests for time for oral comments must be sent to Marta Call, RAC Program Coordinator, Apache-Sitgreaves NF, P.O. Box 640, Springerville, Arizona 85938; or by email to *martaicall@fs.fed.us,* or via facsimile to 928–333–5966.

Meeting Accommodations: If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpreting, assistive listening devices or other reasonable accommodation for access to the facility or proceedings by contacting the person listed in the section titled **FOR FURTHER INFORMATION CONTACT.** All reasonable accommodation requests are managed on a case by case basis.

Dated: May 12, 2016.

Wendy Jo Haskins,

Deputy Forest Supervisor.

[FR Doc. 2016–12038 Filed 5–20–16; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

Tri-County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Tri-County Resource Advisory Committee (RAC) will meet in Deer Lodge, Montana. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with Title II of the Act. RAC information can be found at the following Web site: *http://www.ft.usda.gov/mainlbdnflworkingtogether/advisorycommittees.*

DATES: The meeting will be held June 28, 2016, from 5:00 p.m. to 9:00 p.m.

All RAC meetings are subject to cancellation. For status of meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT.**

ADDRESSES: The meeting will be held at the USDA Service Center, 1002 Hollenbeck Lane, Deer Lodge, Montana.

Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION.** All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at Beaverhead-Deerlodge National Forest Supervisor's Office. Please call ahead to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Breck Hudson, RAC Coordinator, by phone at 406–683–3935 or via email at *bhudson@fsfed us.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to review and recommend projects for Title II funding.

The meeting is open to the public. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by June 24, 2016, to be scheduled on the agenda. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. Written comments and requests for time to make oral comments must be sent to Breck Hudson, RAC Coordinator, 420 Barrett Street, Dillon, Montana 59725; by email to *bhudson@fsfed us,* or via facsimile to 406–683–3855.

Meeting Accommodations: If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpreting, assistive listening devices, or other reasonable accommodation. For access to the facility or proceedings, please contact the person listed in the section titled **FOR FURTHER INFORMATION CONTACT.** All reasonable accommodation requests are managed on a case by case basis.

Dated: May 13, 2016.

Melany Glossa,

Forest Supervisor.

[FR Doc. 2016–11792 Filed 5–20–16; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

Prince of Wales Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Prince of Wales Resource Advisory Committee (RAC) will meet in Craig, Alaska. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with Title II of the Act. RAC information can be found at the following Web site: *https://fsplaces.fs.fed.us/fsfiles/unit/wo/secure_rural_schools.nsf.*

DATES: The meeting will be held June 13, 2016, at 10:00 a.m.

All RAC meetings are subject to cancellation. For status of meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT.**

ADDRESSES: The meeting will be held at Craig Ranger District, 504 9th Street, Craig, Alaska. If you wish to attend via teleconference, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION**. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at the Craig Ranger District. Please call ahead to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Amy Manuel, RAC Coordinator, by phone at 907–228–6200 or via email at *amymmanuel@fs.fed.us.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to review and recommend projects authorized under Title II of the Act.

The meeting is open to the public. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by June 8, 2016, to be scheduled on the agenda. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. Written comments and requests for time to make oral comments must be sent to Matthew Anderson, Designated Federal Officer, P.O. Box 500, Craig, Alaska 99921; by email to *mdanderson@fs.fed.us,* or via facsimile to 907–826–2972.

Meeting Accommodations: If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpreting, assistive listening devices, or other reasonable accommodation. For access to the facility or proceedings, please contact the person listed in the section titled **FOR FURTHER INFORMATION CONTACT**. All reasonable accommodation requests are managed on a case by case basis.

Dated: May 4, 2016.

Matt D. Anderson,

District Ranger.

[FR Doc. 2016–11795 Filed 5–20–16; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Rural Housing Service

Notice of Funds Availability (NOFA) for the Rural Community Development Initiative (RCDI) for Fiscal Year 2016

AGENCY: Rural Housing Service, USDA.

ACTION: Notice.

SUMMARY: The Rural Housing Service (RHS), an agency within the USDA Rural Development mission area herein referred to as the Agency announces the availability of funding under the Rural Community Development Initiative (RCDI) program. Applicants must provide matching funds in an amount at least equal to the Federal grant. These grants will be made to qualified intermediary organizations that will provide financial and technical assistance to recipients to develop their capacity and ability to undertake projects related to housing, community facilities, or community and economic development that will support the community.

This Notice lists the information needed to submit an application for these funds. This Notice contains revised evaluation criteria that are streamlined, in order to enhance program efficiency and delivery.

DATES: The deadline for receipt of an application is 4 p.m. local time, July 22, 2016. The application date and time are firm. The Agency will not consider any application received after the deadline. Applicants intending to mail applications must provide sufficient time to permit delivery on or before the closing deadline date and time. Acceptance by the United States Postal Service or private mailer does not constitute delivery. Facsimile (FAX), electronic mail and postage due applications will not be accepted.

ADDRESSES: Entities wishing to apply for assistance may download the application documents and requirements delineated in this Notice from the RCDI Web site: *http://www.rd.usda.gov/programs-services/rural-community-development-initiative-grants.*

Application information for electronic submissions may be found at *http://www.grants.gov.*

Applicants may also request paper application packages from the Rural Development office in their state. A list of Rural Development State offices contacts can be found via *http://www.rd.usda.gov/files/RCDI_State_Contacts.pdf.*

FOR FURTHER INFORMATION CONTACT: The Rural Development office for the state in which the applicant is located. A list of Rural Development State Office contacts is provided at the following link: *http://www.rd.usda.gov/files/RCDI_State_Contacts.pdf.*

Paperwork Reduction Act

The paperwork burden has been cleared by the Office of Management and Budget (OMB) under OMB Control Number 0575–0180.

SUPPLEMENTARY INFORMATION:

Overview

Federal Agency: Rural Housing Service.

Funding Opportunity Title: Rural Community Development Initiative.

Announcement Type: Initial Announcement.

Catalog of Federal Domestic Assistance (CFDA) Number: 10.446.

Dates: The deadline for receipt of an application is 4 p.m. local time, July 22, 2016. The application date and time are firm. The Agency will not consider any application received after the deadline. Applicants intending to mail applications must provide sufficient time to permit delivery on or before the closing deadline date and time. Acceptance by the United States Postal Service or private mailer does not constitute delivery. Facsimile (FAX), electronic mail and postage due applications will not be accepted.

A. Program Description

Congress first authorized the RCDI in 1999 (Pub. L. 106–78, which was amended most recently by the Consolidated Appropriations Act, 2016 (Pub. L. 114–113)). The RCDI was authorized to develop the capacity and ability of qualified private, nonprofit community-based housing and community development organizations, low-income rural communities, and federally recognized Native American Tribes to undertake projects related to housing, community facilities, or community and economic development in rural areas. Strengthening the recipient's capacity in these areas will benefit the communities they serve. The RCDI structure requires the intermediary (grantee) to provide a program of financial and technical assistance to recipients. The recipients will, in turn, provide programs to their communities (beneficiaries).

Of particular note this year, the Agency is encouraging applications for projects based in or servicing high poverty areas. This emphasis will support Rural Development's (RD) mission of improving the quality of life for rural Americans and commitment to directing resources to those who most need them.

B. Federal Award Information

Congress, in the Consolidated Appropriations Act, 2016 (Pub. L. 114–113), appropriated $4,000,000 in Fiscal Year (FY) 2016 for the RCDI program. The amount of funding received in the FY 2016 Appropriations Act can also be found at the following link: *http://www.rd.usda.gov/files/RD_FY2016AppropriationsTable.pdf.*

Qualified private, nonprofit and public (including tribal) intermediary organizations proposing to carry out financial and technical assistance programs will be eligible to receive the grant funding.

The intermediary will be required to provide matching funds in an amount at least equal to the RCDI grant.

A grant will be the type of assistance instrument awarded to successful applications.

The respective minimum and maximum grant amount per intermediary is $50,000 and $250,000.

Grant funds must be utilized within 3 years from date of the award.

A grantee that has an outstanding RCDI grant over 3 years old, as of the application due date in this Notice, is not eligible to apply for this round of funding.

The intermediary must provide a program of financial and technical assistance to one or more of the following: A private, nonprofit community-based housing and development organization, a low-income rural community or a federally recognized tribe.

Applicants must certify compliance with sections 743 and 744 of the Consolidated Appropriations Act, 2016, Public Law 114–113. These provisions state:

SEC. 743.

(a) None of the funds appropriated or otherwise made available by this or any other Act may be available for a contract, grant, or cooperative agreement with an entity that requires employees or contractors of such entity seeking to report fraud, waste, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or contractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.

(b) The limitation in subsection (a) shall not contravene requirements applicable to Standard Form 312, Form 4414, or any other form issued by a Federal department or agency governing the nondisclosure of classified information.

SEC. 744.

(a) No funds appropriated in this or any other Act may be used to implement or enforce the agreements in Standard Forms 312 and 4414 of the Government or any other nondisclosure policy, form, or agreement if such policy, form, or agreement does not contain the following provisions: "These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.": Provided, That notwithstanding the preceding provision of this section, a nondisclosure policy form or agreement that is to be executed by a person connected with the conduct of an intelligence or intelligence-related activity, other than an employee or officer of the United States Government, may contain provisions appropriate to the particular activity for which such document is to be used. Such form or agreement shall, at a minimum, require that the person will not disclose any classified information received in the course of such activity unless specifically authorized to do so by the United States Government. Such nondisclosure forms shall also make it clear that they do not bar disclosures to Congress, or to an authorized official of an executive agency or the Department of Justice, that are essential to reporting a substantial violation of law.

(b) A nondisclosure agreement may continue to be implemented and enforced notwithstanding subsection (a) if it complies with the requirements for such agreement that were in effect when the agreement was entered into.

(c) No funds appropriated in this or any other Act may be used to implement or enforce any agreement entered into during fiscal year 2014 which does not contain substantially similar language to that required in subsection (a).

C. Eligibility Information

Applicants must meet all of the following eligibility requirements by the application deadline. Applications which fail to meet any of these requirements by the application deadline will be deemed ineligible and will not be evaluated further, and will not receive a Federal award.

1. Eligible Applicants

(a) Qualified private, nonprofit, (including faith-based and community organizations and philanthropic foundations), in accordance with 7 CFR part 16, and public (including tribal) intermediary organizations are eligible applicants. Definitions that describe eligible organizations and other key terms are listed below.

(b) The recipient must be a nonprofit community-based housing and development organization, low-income rural community, or federally recognized tribe based on the RCDI definitions of these groups.

(c) Private nonprofit, faith or community-based organizations must provide a certificate of incorporation and good standing from the Secretary of the State of incorporation, or other similar and valid documentation of current nonprofit status. For low-income rural community recipients, the Agency requires evidence that the entity is a public body and census data verifying that the median household income of the community where the office receiving the financial and technical assistance is located is at, or below, 80 percent of the State or national median household income, whichever is higher. For federally recognized tribes, the Agency needs the page listing their name from the current **Federal Register** list of tribal entities recognized and eligible for funding services (see the definition of federally recognized tribes in this Notice for details on this list).

(d) Any corporation (1) that has been convicted of a felony criminal violation under any Federal law within the past 24 months or (2) that has any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability; is not eligible for financial assistance provided with funds appropriated by the Consolidated Appropriations Act, 2016, unless a Federal agency has considered suspension or debarment of the corporation and has made a determination that this further action is not necessary to protect the interests of the Government.

2. Cost Sharing or Matching

There is a matching requirement of at least equal to the amount of the grant. If this matching funds requirement is not met, the application will be deemed ineligible. See section D, Application and Submission Information, for required pre-award and post award matching funds documentation submission.

The intermediary must provide matching funds at least equal to the amount of the grant. Verification of matching funds must be submitted with the application. Matching funds must be committed for a period equal to the grant performance period. The intermediary will be required to provide matching funds in an amount at least equal to the RCDI grant. In-kind contributions such as salaries, donated time and effort, real and nonexpendable personal property and goods and services cannot be used as matching funds.

Matching funds are cash or confirmed funding commitments and must be at least equal to the grant amount and committed for a period of not less than the grant performance period. These funds can only be used for eligible RCDI activities. Matching funds must be used to support the overall purpose of the RCDI program.

In-kind contributions such as salaries, donated time and effort, real and nonexpendable personal property and goods and services cannot be used as matching funds.

Grant funds and matching funds must be used in equal proportions. This does not mean funds have to be used equally by line item.

The request for advance or reimbursement and supporting documentation must show that RCDI fund usage does not exceed the cumulative amount of matching funds used.

Grant funds will be disbursed pursuant to relevant provisions of 2 CFR parts 200 and 400. Verification of matching funds must be submitted with the application. See Section D, other program requirements, for matching funds documentation and pre-award requirements.

The intermediary is responsible for demonstrating that matching funds are available, and committed for a period of not less than the grant performance period to the RCDI proposal. Matching funds may be provided by the intermediary or a third party. Other Federal funds may be used as matching funds if authorized by statute and the purpose of the funds is an eligible RCDI purpose.

RCDI funds will be disbursed on an advance or reimbursement basis. Matching funds cannot be expended prior to execution of the RCDI Grant Agreement.

3. Other Program Requirements

(a) The recipient and beneficiary, but not the intermediary, must be located in an eligible rural area. The physical location of the recipient's office that will be receiving the financial and technical assistance must be in an eligible rural area. If the recipient is a low-income community, the median household income of the area where the office is located must be at or below 80 percent of the State or national median household income, whichever is higher. The applicable Rural Development State Office can assist in determining the eligibility of an area.

A listing of Rural Development State Office contacts can be found at the following link: *http://www.rd.usda.gov/files/RCDI_State_Contacts.pdf.* A map showing eligible rural areas can be found at the following link: *http://eligibility.sc.egov.usda.gov/eligibility/welcomeAction.do?pageAction=RBSmenu&NavKey=property@13.*

(b) RCDI grantees that have an outstanding grant over 3 years old, as of the application due date in this Notice, will not be eligible to apply for this round of funding. Grant and matching funds must be utilized in a timely manner to ensure that the goals and objectives of the program are met.

(c) Individuals cannot be recipients.

(d) The intermediary must provide a program of financial and technical assistance to the recipient.

(e) The intermediary organization must have been legally organized for a minimum of 3 years and have at least 3 years prior experience working with private nonprofit community-based housing and development organizations, low-income rural communities, or tribal organizations in the areas of housing, community facilities, or community and economic development.

(f) Proposals must be structured to utilize the grant funds within 3 years from the date of the award.

(g) Each applicant, whether singularly or jointly, may only submit one application for RCDI funds under this Notice. This restriction does not preclude the applicant from providing matching funds for other applications.

(h) Recipients can benefit from more than one RCDI application; however, after grant selections are made, the recipient can only benefit from multiple RCDI grants if the type of financial and technical assistance the recipient will receive is not duplicative. The services described in multiple RCDI grant applications must have separate and identifiable accounts for compliance purposes.

(i) The intermediary and the recipient cannot be the same entity. The recipient can be a related entity to the intermediary, if it meets the definition of a recipient, provided the relationship does not create a Conflict of Interest that cannot be resolved to Rural Development's satisfaction.

(j) If the recipient is a low-income rural community, identify the unit of government to which the financial and technical assistance will be provided, *e.g.,* town council or village board. The financial and technical assistance must be provided to the organized unit of government representing that community, not the community at large.

4. Eligible Grant Purposes

Fund uses must be consistent with the RCDI purpose. A nonexclusive list of eligible grant uses includes the following:

(a) Provide technical assistance to develop recipients' capacity and ability to undertake projects related to housing, community facilities, or community and economic development, *e.g.,* the intermediary hires a staff person to provide technical assistance to the recipient or the recipient hires a staff person, under the supervision of the intermediary, to carry out the technical assistance provided by the intermediary.

(b) Develop the capacity of recipients to conduct community development programs, *e.g.,* homeownership education or training for business entrepreneurs.

(c) Develop the capacity of recipients to conduct development initiatives, *e.g.,* programs that support micro-enterprise and sustainable development.

(d) Develop the capacity of recipients to increase their leveraging ability and access to alternative funding sources by providing training and staffing.

(e) Develop the capacity of recipients to provide the technical assistance component for essential community facilities projects.

(f) Assist recipients in completing pre-development requirements for housing, community facilities, or community and economic development projects by providing resources for professional services, *e.g.,* architectural, engineering, or legal.

(g) Improve recipient's organizational capacity by providing training and resource material on developing strategic plans, board operations, management, financial systems, and information technology.

(h) Purchase of computers, software, and printers, limited to $10,000 per award, at the recipient level when directly related to the technical assistance program being undertaken by the intermediary.

(i) Provide funds to recipients for training-related travel costs and training expenses related to RCDI.

5. Ineligible Fund Uses

The following is a list of ineligible grant uses:

(a) Pass-through grants, and any funds provided to the recipient in a lump sum that are not reimbursements.

(b) Funding a revolving loan fund (RLF).

(c) Construction (in any form).

(d) Salaries for positions involved in construction, renovations, rehabilitation, and any oversight of these types of activities.

(e) Intermediary preparation of strategic plans for recipients.

(f) Funding prostitution, gambling, or any illegal activities.

(g) Grants to individuals.

(h) Funding a grant where there may be a conflict of interest, or an appearance of a conflict of interest, involving any action by the Agency.

(i) Paying obligations incurred before the beginning date without prior Agency approval or after the ending date of the grant agreement.

(j) Purchasing real estate.

(k) Improvement or renovation of the grantee's, or recipient's office space or for the repair or maintenance of privately owned vehicles.

(l) Any purpose prohibited in 2 CFR part 200 or 400.

(m) Using funds for recipient's general operating costs.

(n) Using grant or matching funds for Individual Development Accounts.

(o) Purchasing vehicles.

6. Program Examples and Restrictions

The following are examples of eligible and ineligible purposes under the RCDI program. (These examples are illustrative and are not meant to limit the activities proposed in the application. Activities that meet the objectives of the RCDI program and meet the criteria outlined in this Notice will be considered eligible.)

(a) The intermediary must work directly with the recipient, not the ultimate beneficiaries. As an example:

The intermediary provides training to the recipient on how to conduct homeownership education classes. The recipient then provides ongoing homeownership education to the residents of the community—the ultimate beneficiaries. This "train the trainer" concept fully meets the intent of this initiative. The intermediary is providing technical assistance that will build the recipient's capacity by enabling them to conduct homeownership education classes for the public.

This is an eligible purpose. However, if the intermediary directly provided homeownership education classes to individuals in the recipient's service area, this would not be an eligible purpose because the recipient would be bypassed.

(b) If the intermediary is working with a low-income community as the recipient, the intermediary must provide the technical assistance to the entity that represents the low-income community and is identified in the application. Examples of entities representing a low-income community are a village board or a town council.

If the intermediary provides technical assistance to the Board of the low-income community on how to establish a cooperative, this would be an eligible purpose. However, if the intermediary works directly with individuals from the community to establish the cooperative, this is not an eligible purpose.

The recipient's capacity is built by learning skills that will enable them to support sustainable economic development in their communities on an ongoing basis.

(c) The intermediary may provide technical assistance to the recipient on how to create and operate a revolving loan fund. The intermediary may not monitor or operate the revolving loan fund. RCDI funds, including matching funds, cannot be used to fund revolving loan funds.

(d) The intermediary may work with recipients in building their capacity to provide planning and leadership development training. The recipients of this training would be expected to assume leadership roles in the development and execution of regional strategic plans. The intermediary would work with multiple recipients in helping communities recognize their connections to the greater regional and national economies.

(e) The intermediary could provide training and technical assistance to the recipients on developing emergency shelter and feeding, short-term housing, search and rescue, and environmental accident, prevention, and cleanup program plans. For longer term disaster and economic crisis responses, the intermediary could work with the recipients to develop job placement and training programs, and develop coordinated transit systems for displaced workers.

D. Application and Submission Information

1. Address To Request Application Package

Entities wishing to apply for assistance may download the application documents and requirements delineated in this Notice from the RCDI Web site: *http://www.rd.usda.gov/programs-services/rural-community-development-initiative-grants.*

Application information for electronic submissions may be found at *http://www.grants.gov.*

Applicants may also request paper application packages from the Rural Development office in their state. A list of Rural Development State office contacts can be found via *http://www.rd.usda.gov/files/RCDI_State_Contacts.pdf.* You may also obtain a copy by calling 202–205–9685.

2. Content and Form of Application Submission

If the applicant is ineligible or the application is incomplete, the Agency will inform the applicant in writing of the decision, reasons therefore, and its appeal rights and no further evaluation of the application will occur.

A complete application for RCDI funds must include the following:

(a) A summary page, double-spaced between items, listing the following: (This information should not be presented in narrative form.)

(1) Applicant's name,

(2) Applicant's address,

(3) Applicant's telephone number,

(4) Name of applicant's contact person, email address and telephone number,

(5) Applicant's fax number,

(6) County where applicant is located,

(7) Congressional district number where applicant is located,

(8) Amount of grant request, and

(9) Number of recipients.

(b) A detailed Table of Contents containing page numbers for each component of the application.

(c) A project overview, no longer than one page, including the following items, which will also be addressed separately and in detail under "Building Capacity and Expertise" of the "Evaluation Criteria."

(1) The type of technical assistance to be provided to the recipients and how it will be implemented.

(2) How the capacity and ability of the recipients will be improved.

(3) The overall goals to be accomplished.

(4) The benchmarks to be used to measure the success of the program. Benchmarks should be specific and quantifiable.

(d) Organizational documents, such as a certificate of incorporation and a current good standing certification from the Secretary of State where the applicant is incorporated and other similar and valid documentation of current non-profit status, from the intermediary that confirms it has been legally organized for a minimum of 3 years as the applicant entity.

(e) Verification of source and amount of matching funds, *e.g.,* a copy of a bank statement if matching funds are in cash or a copy of the confirmed funding commitment from the funding source.

The verification must show that matching funds are available for the duration of the grant performance period. The verification of matching funds must be submitted with the application or the application will be considered incomplete.

The applicant will be contacted by the Agency prior to grant award to verify that the matching funds provided with the application continue to be available. The applicant will have 15 days from the date contacted to submit verification that matching funds continue to be available.

If the applicant is unable to provide the verification within that timeframe, the application will be considered ineligible. The applicant must maintain bank statements on file or other documentation for a period of at least 3 years after grant closing except that the records shall be retained beyond the 3-year period if audit findings have not been resolved.

(f) The following information for each recipient:

(1) Recipient's entity name,

(2) Complete address (mailing and physical location, if different),

(3) County where located,

(4) Number of Congressional district where recipient is located,

(5) Contact person's name, email address and telephone number and,

(6) Form RD 400–4, "Assurance Agreement." If the Form RD 400–4 is not submitted for the applicant and each recipient, the recipient will be considered ineligible. No information pertaining to that recipient will be included in the income or population scoring criteria and the requested funding may be adjusted due to the deletion of the recipient.

(g) Submit evidence that each recipient entity is eligible. Documentation must be submitted to verify recipient eligibility. Acceptable documentation varies depending on the type of recipient:

(1) Nonprofits—provide a current valid letter confirming non-profit status from the Secretary of the State of incorporation, a current good standing certification from the Secretary of the State of incorporation, or other valid documentation of current nonprofit status of each recipient.

A nonprofit recipient must provide evidence that it is a valid nonprofit when the intermediary applies for the RCDI grant. Organizations with pending requests for nonprofit designations are not eligible.

(2) Low-income rural community—provide evidence the entity is a public body (copy of Charter, relevant Acts of Assembly, relevant court orders (if created judicially) or other valid documentation), a copy of the 2010 census data to verify the population, and 2010 American Community Survey (ACS) 5-year estimates (2006–2010 data set) data as evidence that the median household income is at, or below, 80 percent of either the State or national median household income. We will only accept data and printouts from *http://www.census.gov.*

(3) Federally recognized tribes—provide the page listing their name from the **Federal Register** list of tribal entities published most recently by the Bureau of Indian Affairs. The 2015 list is available at 80 FR 1942–48 and *http://www.indianaffairs.gov/cs/groups/public/documents/text/idc1-029079.pdf.*

(h) Each of the "Evaluation Criteria" must be addressed specifically and individually by category. Present these criteria in narrative form. Documentation must be limited to five pages per criterion. The "Population and Income" criteria for recipient locations can be provided in the form of a list; however, the source of the data must be included on the page(s).

(i) A timeline identifying specific activities and proposed dates for completion.

(j) A detailed project budget that includes the RCDI grant amount and matching funds. This should be a line-item budget, by category. Categories such as salaries, administrative, other, and indirect costs that pertain to the proposed project must be clearly defined. Supporting documentation listing the components of these categories must be included. The budget should be dated: Year 1, year 2, year 3, as applicable.

(k) The indirect cost category in the project budget should be used only when a grant applicant has a federally negotiated indirect cost rate. A copy of the current rate agreement must be provided with the application. Non-federal entities that have never received a negotiated indirect cost rate, except for those non-Federal entities described in Appendix VII to Part 200—States and Local Government and Indian Tribe Indirect Cost Proposals, paragraph (d)(1)(B), may use the de minimis rate of 10% of modified total direct costs (MTDC).

(l) Form SF–424, "Application for Federal Assistance." (Do not complete Form SF–424A, "Budget Information." A separate line-item budget should be presented as described in Letter (J) of this section.)

(m) Form SF–424B, "Assurances—Non-Construction Programs."

(n) Form AD–1047, "Certification Regarding Debarment, Suspension, and Other Responsibility Matters—Primary Covered Transactions."

(o) Form AD–1048, "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transactions."

(p) Form AD–1049, "Certification Regarding Drug-Free Workplace Requirements."

(q) Certification of Non-Lobbying Activities.

(r) Standard Form LLL, "Disclosure of Lobbying Activities," if applicable.

(s) Form RD 400–4, "Assurance Agreement," for the applicant and each recipient.

(t) Identify and report any association or relationship with Rural Development employees. (A statement acknowledging whether or not a relationship exists is required).

(u) Form AD–3030, "Representations Regarding Felony Conviction and Tax Delinquent Status for Corporate Applicants," if you are a corporation. A corporation is any entity that has filed articles of incorporation in one of the 50 States, the District of Columbia, the Federated States of Micronesia, the Republic of Palau, and the Republic of the Marshall Islands, or the various territories of the United States including American Samoa, Guam, Midway Islands, Northern Mariana Islands, Puerto Rico, or the U.S. Virgin Islands. Corporations include both for profit and non-profit entities.

3. Dun and Bradstreet Data Universal Numbering System (DUNS) and System for Awards Management (SAM)

Grant applicants must obtain a Dun and Bradstreet Data Universal Numbering System (DUNS) number and register in the System for Award Management (SAM) prior to submitting a pre-application pursuant to 2 CFR 25.200(b). In addition, an entity applicant must maintain registration in SAM at all times during which it has an active Federal award or an application or plan under consideration by the Agency. Similarly, all recipients of Federal financial assistance are required to report information about first-tier subawards and executive compensation in accordance to 2 CFR part 170. So long as an entity applicant does not have an exception under 2 CFR 170.110(b), the applicant must have the necessary processes and systems in place to comply with the reporting requirements should the applicant receive funding. See 2 CFR 170.200(b).

An applicant, unless excepted under 2 CFR 25.110(b), (c), or (d), is required to:

(a) Be registered in SAM before submitting its application;

(b) Provide a valid DUNS number in its application; and

(c) Continue to maintain an active SAM registration with current information at all times during which it has an active Federal award or an application or plan under consideration by a Federal awarding agency.

The Federal awarding agency may not make a federal award to an applicant until the applicant has complied with all applicable DUNS and SAM requirements and, if an applicant has not fully complied with the requirements by the time the Federal awarding agency is ready to make a Federal award, the Federal awarding agency may determine that the applicant is not qualified to receive a Federal award and use that determination as a basis for making a Federal award to another applicant.

As required by the Office of Management and Budget (OMB), all grant applications must provide a DUNS number when applying for Federal grants, on or after October 1, 2003. Organizations can receive a DUNS number at no cost by calling the dedicated toll-free number at 1–866–705–5711 or via Internet at *http://fedgov.dnb.com/webform*. Additional information concerning this requirement can be obtained on the *Grants.gov* Web site at *http://www.grants.gov*. Similarly, applicants may register for SAM at *https://www.sam.gov* or by calling 1–866–606–8220.

The DUNS number should be identified in the "Organizational DUNS" field on Standard Form (SF) 424, "Application for Federal Assistance." Since there are no specific fields for a Commercial and Government Entity (CAGE) code and expiration date, they may be identified anywhere on the Form SF 424. If the applicant does not provide the CAGE code and expiration date and the DUNS number in the application, it will not be considered for funding. The required forms and certifications can be downloaded from the RCDI Web site at: *http://www.rd.usda.gov/programs-services/rural-community-development-initiative-grants*.

4. Submission Dates and Times

The deadline for receipt of an application is 4 p.m. local time, July 22, 2016. The application date and time are firm. The Agency will not consider any application received after the deadline. You may submit your application in paper form or electronically through *Grants.gov*. Applicants intending to mail applications must provide sufficient time to permit delivery on or before the closing deadline date and time. Acceptance by the United States Postal Service or private mailer does not constitute delivery. Facsimile (FAX), electronic mail and postage due applications will not be accepted.

To submit a paper application, the original application package must be submitted to the Rural Development State Office where the applicant's headquarters is located.

A listing of Rural Development State Offices contacts can be found via *http://www.rd.usda.gov/files/RCDI_State_Contacts.pdf*. Applications will not be accepted via FAX or electronic mail.

Applicants may file an electronic application at *http://www.grants.gov*. *Grants.gov* contains full instructions on all required passwords, credentialing, and software. Follow the instructions at *Grants.gov* for registering and submitting an electronic application. If a system problem or technical difficulty occurs with an electronic application, please use the customer support resources available at the *Grants.gov* Web site.

Technical difficulties submitting an application through *Grants.gov* will not be a reason to extend the application deadline. If an application is unable to be submitted through *Grants.gov*, a paper application must be received in the appropriate Rural Development State Office by the deadline noted previously.

First time *Grants.gov* users should carefully read and follow the registration steps listed on the Web site. These steps need to be initiated early in the application process to avoid delays in submitting your application online.

In order to register with System for Award Management (SAM), your organization will need a DUNS number. Be sure to complete the Marketing Partner ID (MPID) and Electronic Business Primary Point of Contact fields during the SAM registration process.

These are mandatory fields that are required when submitting grant applications through *Grants.gov*. Additional application instructions for submitting an electronic application can be found by selecting this funding opportunity on *Grants.gov*.

5. Funding Restrictions

Meeting expenses. In accordance with 31 U.S.C. 1345, "Expenses of Meetings," appropriations may not be used for travel, transportation, and subsistence expenses for a meeting. RCDI grant funds cannot be used for these meeting-related expenses. Matching funds may, however, be used to pay for these expenses.

RCDI funds may be used to pay for a speaker as part of a program, equipment to facilitate the program, and the actual room that will house the meeting.

RCDI funds cannot be used for meetings; they can, however, be used for travel, transportation, or subsistence expenses for program-related training and technical assistance purposes. Any training not delineated in the application must be approved by the Agency to verify compliance with 31 U.S.C. 1345. Travel and per diem expenses (including meals and incidental expenses) will be allowed in accordance with 2 CFR parts 200 and 400.

E. Application Review Information

1. Evaluation Criteria

Applications will be evaluated using the following criteria and weights:

(a) Building Capacity and Expertise—Maximum 40 Points

The applicant must demonstrate how they will improve the recipients' capacity, through a program of financial and technical assistance, as it relates to the RCDI purposes.

Capacity-building financial and technical assistance should provide new functions to the recipients or expand existing functions that will enable the recipients to undertake projects in the areas of housing, community facilities, or community and economic development that will benefit the community. Capacity-building financial and technical assistance may include, but is not limited to: Training to conduct community development programs, *e.g.*, homeownership education, or the establishment of minority business entrepreneurs, cooperatives, or micro-enterprises; organizational development, *e.g.*, assistance to develop or improve board operations, management, and financial systems; instruction on how to develop and implement a strategic plan; instruction on how to access alternative funding sources to increase leveraging opportunities; staffing, *e.g.*, hiring a person at intermediary or recipient level to provide technical assistance to recipients.

The program of financial and technical assistance that is to be provided, its delivery, and the measurability of the program's effectiveness will determine the merit of the application.

All applications will be competitively ranked with the applications providing the most improvement in capacity development and measurable activities being ranked the highest.

The narrative response must contain the following items. This list also contains the points for each item.

(1) Describe the nature of financial and technical assistance to be provided to the recipients and the activities that will be conducted to deliver the technical assistance; (10 Points)

(2) Explain how financial and technical assistance will develop or increase the recipient's capacity. Indicate whether a new function is being developed or if existing functions are being expanded or performed more effectively; (7 Points)

(3) Identify which RCDI purpose areas will be addressed with this assistance: Housing, community facilities, or community and economic development; (3 Points)

(4) Describe how the results of the technical assistance will be measured. What benchmarks will be used to measure effectiveness? Benchmarks should be specific and quantifiable; (5 Points)

(5) Demonstrate that it has conducted programs of financial and technical assistance and achieved measurable results in the areas of housing, community facilities, or community and economic development in rural areas; (10 Points)

(6) Provide in a chart or excel spreadsheet, the organization name, point of contact, address, phone number, email address, and the type and amount of the financial and technical assistance the applicant organization has provided to the following for the last 3 years: (5 Points)

(i) Nonprofit organizations in rural areas.

(ii) Low-income communities in rural areas (also include the type of entity, *e.g.*, city government, town council, or village board).

(iii) Federally recognized tribes or any other culturally diverse organizations.

(b) Soundness of Approach—Maximum 15 Points

The applicant can receive up to 15 points for soundness of approach. The overall proposal will be considered under this criterion.

Applicants must list the page numbers in the application that address these factors.

The maximum 15 points for this criterion will be based on the following:

(1) The proposal fits the objectives for which applications were invited, is clearly stated, and the applicant has defined how this proposal will be implemented. (7 Points)

(2) The ability to provide the proposed financial and technical assistance based on prior accomplishments. (6 Points)

(3) Cost effectiveness will be evaluated based on the budget in the application. The proposed grant amount and matching funds should be utilized to maximize capacity building at the recipient level. (2 Points)

(c) Population and Income—Maximum 15 Points

Population is based on the average population from the 2010 census data for the communities in which the recipients are located. The physical address, not mailing address, for each recipient must be used for this criterion. Community is defined for scoring purposes as a city, town, village, county, parish, borough, or census-designated place where the recipient's office is physically located.

The applicant must submit the census data from the following Web site in the form of a printout of the applicable "Fact Sheet" to verify the population figures used for each recipient. The data can be accessed on the Internet at *http://www.census.gov;* click on "American FactFinder," fill in field and click "Go"; the name and population data for each recipient location must be listed in this section.

The average population of the recipient locations will be used and will be scored as follows:

Population	Scoring (points)
10,000 or less	5
10,001 to 20,000	4
20,001 to 30,000	3
30,001 to 40,000	2
40,001 to 50,000	1

The average of the median household income for the communities where the recipients are physically located will determine the points awarded. The physical address, not mailing address, for each recipient must be used for this criterion. Applicants may compare the average recipient median household income to the State median household income or the national median household income, whichever yields the most points. The national median household income to be used is $51,914.

The applicant must submit the income data in the form of a printout of the applicable information from the following Web site to verify the income for each recipient. The data being used is from the 2010 American Community Survey (ACS) 5-year estimates (2006–2010 data set). The data can be accessed on the Internet at *http://www.census.gov;* click on "American FactFinder" (under "Find Data" at bottom of page), "Advanced Search" (click on "Show Me All" tab, "Topics," "Dataset," locate 2010 ACS 5 year estimates, close table, check the "Median Income" table (S1903 on page 2), fill in the "state, county or place" field (at top of page), select "Go" and click "View"; the name and income data for each recipient location must be listed in this section (use the Household and Median Income column). Points will be awarded as follows:

Average recipient median income	Scoring (points)
Less than or equal to 70 percent of state or national median household income	10
Greater than 70, but less than or equal to 80 percent of state or national median household income	5
In excess of 80 percent of state or national median household income	0

(d) State Director's Points Based on Project Merit—Maximum 10 Points

(1) This criterion will be addressed by the Agency, not the applicant.

(2) Up to 10 points may be awarded by the Rural Development State Director to any application(s) that benefits their state regardless of whether the applicant is headquartered in their state. The total points awarded under this criterion, to all applications, will not exceed 10.

(3) When an intermediary submits an application that will benefit a state that is not the same as the state in which the intermediary is headquartered, it is the intermediary's responsibility to notify the State Director of the state which is receiving the benefit of their application. In such cases, State Directors awarding points to applications benefiting their state must notify the reviewing state in writing.

(4) Assignment of any points under this criterion requires a written justification and must be tied to and awarded based on how closely the

application aligns with the Rural Development State Office's strategic goals.

(e) Support of Agency's Strategic Goals—Maximum 20 Points

This criterion will be addressed by the Agency, not the applicant. The Agency Administrator may award up to 20 points to any application to the extent that the application supports Strategic Goal One in the USDA Strategic Plan 2014–2018. This plan can be found at the following link: *www.usda.gov/documents/usda-strategic-plan-fy-2014-2018.pdf.*

Points may be awarded to applications that meet at least one of the following six criteria below (note: the maximum points can be given to any one of the following six criteria):

(1) The project is based in a census tract with poverty greater than or equal to 20% (should provide the address and census tract in which the recipient is located);

(2) The project is based in a community (village, town, city, or Census Designated Place) that is 75% CF grant eligible (rural community having a population of 5,000 or less and median household income (MHI) of 60% or less of the state's non-metropolitan median household income (NMHI) (should provide address, population (2010 census) and MHI (ACS 2006–2010 dataset) data in which the recipient is located);

(3) The project's service area includes at least one census tract with poverty greater than or equal to 20% (should provide the address and census tract in which the recipient will conduct or deliver approved project activity);

(4) The project's service area includes at least one community (village, town, city, or Census Designated Place) that is 75% CF grant eligible (rural community having a population of 5,000 or less and MHI of 60% or less of the state's NMHI) (should provide address, population (2010 census) and MHI (ACS 2006–2010 dataset) data in which the recipient will conduct or deliver approved project activity);

(5) The project serves a StrikeForce area (see link below) (should identify the StrikeForce area).

(6) The project serves a Promise Zone (see link below) (should identify the specific Promise Zone) and eligible applicant provides evidence of partnership with a Promise Zone Lead Applicant organization.

For a listing of StrikeForce areas and designated Promise Zones, click on the following link: *http://www.usda.gov/wps/portal/usda/usdahome?navid=STRIKE_FORCE,* then click the StrikeForce or Promise Zones button from the left menu. For a mapping tool identifying census tracts with poverty greater than or equal to 20 percent, click on the following link: *http://rdgdwe.sc.egov.usda.gov/rdpoverty/index.html.*

2. Review and Selection Process

(a) Rating and Ranking

Applications will be rated and ranked on a national basis by a review panel based on the "Evaluation Criteria" contained in this Notice.

If there is a tied score after the applications have been rated and ranked, the tie will be resolved by reviewing the scores for "Building Capacity and Expertise" and the applicant with the highest score in that category will receive a higher ranking. If the scores for "Building Capacity and Expertise" are the same, the scores will be compared for the next criterion, in sequential order, until one highest score can be determined.

(b) Initial Screening

The Agency will screen each application to determine eligibility during the period immediately following the application deadline. Listed below are examples of reasons for rejection from previous funding rounds. The following reasons for rejection are not all inclusive; however, they represent the majority of the applications previously rejected.

(1) Recipients were not located in eligible rural areas based on the definition in this Notice.

(2) Applicants failed to provide evidence of recipient's status, *i.e.,* documentation supporting nonprofit evidence of organization.

(3) Applicants failed to provide evidence of committed matching funds or matching funds were not committed for a period at least equal to the grant performance period.

(4) Application did not follow the RCDI structure with an intermediary and recipients.

(5) Recipients were not identified in the application.

(6) Intermediary did not provide evidence it had been incorporated for at least 3 years as the applicant entity.

(7) Applicants failed to address the "Evaluation Criteria."

(8) The purpose of the proposal did not qualify as an eligible RCDI purpose.

(9) Inappropriate use of funds (*e.g.,* construction or renovations).

(10) The applicant proposed providing financial and technical assistance directly to individuals.

(11) The application package was not received by closing date and time.

F. Federal Award Administration Information

1. Federal Award Notice

Within the limit of funds available for such purpose, the awarding official of the Agency shall make grants in ranked order to eligible applicants under the procedures set forth in this Notice.

Successful applicants will receive a selection letter by mail containing instructions on requirements necessary to proceed with execution and performance of the award.

This letter is not an authorization to begin performance. In addition, selected applicants will be requested to verify that components of the application have not changed at the time of selection and on the award obligation date, if requested by the Agency.

The award is not approved until all information has been verified, and the awarding official of the Agency has signed Form RD 1940–1, "Request for Obligation of Funds" and the grant agreement.

Unsuccessful applicants will receive notification including appeal rights by mail.

2. Administrative and National Policy Requirements

Grantees will be required to do the following:

(a) Execute a Rural Community Development Initiative Grant Agreement.

(b) Execute Form RD 1940–1, "Request for Obligation of Funds."

(c) Use Form SF 270, "Request for Advance or Reimbursement," to request reimbursements. Provide receipts for expenditures, timesheets and any other documentation to support the request for reimbursement.

(d) Provide financial status and project performance reports on a quarterly basis starting with the first full quarter after the grant award.

(e) Maintain a financial management system that is acceptable to the Agency.

(f) Ensure that records are maintained to document all activities and expenditures utilizing RCDI grant funds and matching funds. Receipts for expenditures will be included in this documentation.

(g) Provide annual audits or management reports on Form RD 442–2, "Statement of Budget, Income and Equity," and Form RD 442–3, "Balance Sheet," depending on the amount of Federal funds expended and the outstanding balance.

(h) Collect and maintain data provided by recipients on race, sex, and national origin and ensure recipients collect and maintain the same data on beneficiaries. Race and ethnicity data will be collected in accordance with OMB **Federal Register** notice, "Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity," (62 FR 58782), October 30, 1997. Sex data will be collected in accordance with Title IX of the Education Amendments of 1972. These items should not be submitted with the application but should be available upon request by the Agency.

(i) Provide a final project performance report.

(j) Identify and report any association or relationship with Rural Development employees.

(k) The intermediary and recipient must comply with Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, Executive Order 12250, Age Act of 1975, Executive Order 13166 Limited English Proficiency and 7 CFR part 1901, subpart E.

(l) The grantee must comply with policies, guidance, and requirements as described in the following applicable Code of Federal Regulations, and any successor regulations:

(i) 2 CFR parts 200 and 400 (Uniform Administrative Requirements, Cost Principles, and Audit Requirements For Federal Awards).

(ii) 2 CFR parts 417 and 180 (Government-wide Debarment and Suspension (Nonprocurement).

(m) Form AD–3031, "Assurance Regarding Felony Conviction or Tax Delinquent Status for Corporate Applicants," Must be signed by corporate applicants who receive an award under this Notice.

3. Reporting

After grant approval and through grant completion, you will be required to provide the following, as indicated in the Grant Agreement:

(a) SF–425, "Federal Financial Report" and SF–PPR, "Performance Progress Report" will be required on a quarterly basis (due 30 working days after each calendar quarter). The Performance Progress Report shall include the elements described in the grant agreement.

(b) Final financial and performance reports will be due 90 calendar days after the period of performance end date.

(c) A summary at the end of the final report with elements as described in the grant agreement to assist in documenting the annual performance goals of the RCDI program for Congress.

G. Federal Awarding Agency Contact

Contact the Rural Development office in the State where the applicant's headquarters is located. A list of Rural Development State Offices contacts can be found via *http://www.rd.usda.gov/files/RCDI_State_Contacts.pdf.*

H. Other Information

Survey on Ensuring Equal Opportunity for Applicants, OMB No. 1894–0010 (applies to nonprofit applicants only—submission is optional).

No reimbursement will be made for any funds expended prior to execution of the RCDI Grant Agreement unless the intermediary is a non-profit or educational entity and has requested and received written Agency approval of the costs prior to the actual expenditure.

This exception is applicable for up to 90 days prior to grant closing and only applies to grantees that have received written approval but have not executed the RCDI Grant Agreement.

The Agency cannot retroactively approve reimbursement for expenditures prior to execution of the RCDI Grant Agreement.

Program Definitions

Agency—The Rural Housing Service (RHS) or its successor.

Beneficiary—Entities or individuals that receive benefits from assistance provided by the recipient.

Capacity—The ability of a recipient to implement housing, community facilities, or community and economic development projects.

Conflict of interest—A situation in which a person or entity has competing personal, professional, or financial interests that make it difficult for the person or business to act impartially. Regarding use of both grant and matching funds, Federal procurement standards prohibit transactions that involve a real or apparent conflict of interest for owners, employees, officers, agents, or their immediate family members having a financial or other interest in the outcome of the project; or that restrict open and free competition for unrestrained trade. Specifically, project funds may not be used for services or goods going to, or coming from, a person or entity with a real or apparent conflict of interest, including, but not limited to, owner(s) and their immediate family members. An example of conflict of interest occurs when the grantee's employees, board of directors, or the immediate family of either, have the appearance of a professional or personal financial interest in the recipients receiving the benefits or services of the grant.

Federally recognized tribes—Tribal entities recognized and eligible for funding and services from the Bureau of Indian Affairs, based on the most recent notice in the **Federal Register** published by the Bureau of Indian Affairs. Tribally Designated Housing Entities are eligible RCDI recipients.

Financial assistance—Funds, not to exceed $10,000 per award, used by the intermediary to purchase supplies and equipment to build the recipient's capacity.

Funds—The RCDI grant and matching money.

Intermediary—A qualified private, nonprofit (including faith-based and community organizations and philanthropic organizations), or public (including tribal) organization that provides financial and technical assistance to multiple recipients.

Low-income rural community—An authority, district, economic development authority, regional council, or unit of government representing an incorporated city, town, village, county, township, parish, or borough whose income is at or below 80 percent of either the state or national Median Household Income as measured by the 2010 Census.

Matching funds—Cash or confirmed funding commitments. Matching funds must be at least equal to the grant amount and committed for a period of not less than the grant performance period.

Recipient—The entity that receives the financial and technical assistance from the Intermediary. The recipient must be a nonprofit community-based housing and development organization, a low-income rural community or a federally recognized Tribe.

Rural and rural area—Any area other than (i) a city or town that has a population of greater than 50,000 inhabitants; and (ii) the urbanized area contiguous and adjacent to such city or town.

Technical assistance—Skilled help in improving the recipient's abilities in the areas of housing, community facilities, or community and economic development.

Non-Discrimination Statement

In accordance with Federal civil rights law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, the USDA, its Agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Persons with disabilities who require alternative means of communication for program information (*e.g.,* Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA's TARGET Center at (202) 720–2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877–8339. Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD–3027, found online at *http://www.ascr.usda.gov/complaint_filing_cust.html* and at any USDA office or write a letter addressed to USDA and provide in the letter all of the information requested in the form. To request a copy of the complaint form, call (866) 632–9992. Submit your completed form or letter to USDA by:

(1) *By mail:* U.S. Department of Agriculture Office of the Assistant Secretary for Civil Rights 1400 Independence Avenue SW., Washington DC 20250–9410;

(2) *Fax:* (202) 690–7442; or

(3) *Email: program.intake@usda.gov.*

Persons With Disabilities

Individuals who are deaf, hard of hearing, or have speech disabilities and you wish to file either an EEO or program complaint please contact USDA through the Federal Relay Service at (800) 877–8339 or (800) 845–6136 (in Spanish).

Persons with disabilities who wish to file a program complaint, please see information above on how to contact us by mail directly or by email.

If you require alternative means of communication for program information (*e.g.,* Braille, large print, audiotape, etc.) please contact USDA's TARGET Center at (202) 720–2600 (voice and TDD).

Appeal Process

All adverse determinations regarding applicant eligibility and the awarding of points as part of the selection process are appealable pursuant to 7 CFR part 11. Instructions on the appeal process will be provided at the time an applicant is notified of the adverse decision.

In the event the applicant is awarded a grant that is less than the amount requested, the applicant will be required to modify its application to conform to the reduced amount before execution of the grant agreement. The Agency reserves the right to reduce or withdraw the award if acceptable modifications are not submitted by the awardee within 15 working days from the date the request for modification is made. Any modifications must be within the scope of the original application.

Dated: May 17, 2016.

Tony Hernandez,

Administrator, Rural Housing Service.

[FR Doc. 2016–12070 Filed 5–20–16; 8:45 am]

BILLING CODE 3410–XV–P

DEPARTMENT OF AGRICULTURE

Rural Housing Service

Request for Proposals: Farm Labor Housing Technical Assistance Grants

AGENCY: Rural Housing Service, USDA.

ACTION: Notice.

SUMMARY: This Request for Proposal (RFP) announces an availability of funds and the timeframe to submit proposals for Farm Labor Housing Technical Assistance (FLH–TA) grants. Section 516(i) of the Housing Act of 1949, as amended (Act), authorizes the Rural Housing Service (RHS) to provide financial assistance (grants) to eligible private and public non-profit agencies to encourage the development of domestic and migrant farm labor housing projects. This RFP requests proposals from qualified private and public non-profit agencies to provide technical assistance to groups who qualify for FLH loans and grants.

Work performed under these grants is expected to result in an increased submission of quality applications for FLH loans and grants under the Section 514 and Section 516 programs and as a result an increase in the availability of decent, safe, and sanitary housing for farm laborers.

DATES: The deadline for receipt of all applications in response to this RFP is 5:00 p.m., Eastern Daylight Time, on July 22, 2016. The application closing deadline is firm as to date and hour. RHS will not consider any application that is received after the closing deadline. Applicants intending to mail applications must provide sufficient time to permit delivery on or before the closing deadline. Acceptance by a post office or private mailer does not constitute delivery. Facsimile (FAX), Cash on Delivery (COD), and postage due applications will not be accepted.

ADDRESSES: Applications should be submitted to the USDA—Rural Housing Service; Attention: Mirna Reyes-Bible, Finance and Loan Analyst, Multi-Family Housing Preservation and Direct Loan Division, STOP 0781 (Room 1243–S), USDA Rural Development, 1400 Independence Avenue SW., Washington, DC 20250–0781. RHS will date and time stamp incoming applications to evidence timely receipt and, upon request, will provide the applicant with a written acknowledgement of receipt.

FOR FURTHER INFORMATION CONTACT: Mirna Reyes-Bible, Finance and Loan Analyst, Multi-Family Housing Preservation and Direct Loan Division, STOP 0781 (Room 1243–S), USDA Rural Development, 1400 Independence Avenue SW., Washington, DC 20250–0781, telephone: (202) 720–1753 (this is not a toll free number), or via email: *mirna.reyesbible@wdc.usda.gov.*

SUPPLEMENTARY INFORMATION:

Overview Information

Federal Agency Name: Rural Housing Service.

Funding Opportunity Title: Request for Proposals (RFP): Farm Labor Housing Technical Assistance Grants.

Announcement Type: Initial Announcement.

Catalog of Federal Domestic Assistance: 10.405.

Dates: The deadline for receipt of all applications in response to this RFP is 5:00 p.m., Eastern Daylight Time, on July 22, 2016. The application closing deadline is firm as to date and hour. RHS will not consider any application that is received after the closing deadline. Applicants intending to mail applications must provide sufficient time to permit delivery on or before the closing deadline. Acceptance by a post office or private mailer does not constitute delivery. Facsimile (FAX), COD, and postage due applications will not be accepted.

I. Program Description

The technical assistance grants authorized under Section 516 of the Act are for the purpose of encouraging the development of domestic and migrant FLH projects under Sections 514 and 516 of the Act. RHS regulations for Section 514 and Section 516 FLH program are published at 7 CFR part 3560. Further requirements for technical assistance grants can be found at 7 CFR part 3560, subpart L. Proposals must demonstrate the capacity to provide the intended technical assistance.

II. Award Information

RHS will publish on its Web site, *http://www.rd.usda.gov/programs-services/farm-labor-housing-direct-loans-grants,* the amount of funding available in FY 2016. RHS intends to award one grant for each of three geographic regions listed below. When establishing the three regions, and amount of funding available for each region, consideration was given to such factors as farmworker migration patterns and the similarity of agricultural products and labor needs within certain areas of the United States. A single applicant may submit grant proposals for more than one region; however, separate proposals must be submitted for each region.

Eastern Region: AL, CT, DE, FL, GA, IN, KY, MA, MD, ME, NH, NJ, NY, NC, OH, PA, PR, RI, SC, TN, VI, VT, VA, and WV.

Central Region: AR, IL, IA, KS, LA, MI, MN, MS, MO, NE., ND, OK, SD, TX, NM, and WI.

Western Region: AK, AZ, CA, CO, HI, ID, MT, NV, OR, UT, WA, WY, Pacific Territories, and Regions

The RHS has the authority under the Act to utilize up to 10 percent of its Section 516 appropriations for FLH–TA grants. The disbursement of grant funds during the grant period will be contingent upon the applicant making progress in meeting the minimum performance requirements as described in the Scope of Work section of this Notice, and the Grant Agreement including, but not limited to, the submission of loan application packages.

III. Eligibility Information

Eligible Applicants: Eligibility for grants under this Notice is limited to private and public non-profit agencies. Applicants must have the knowledge, ability, technical expertise, or practical experience necessary to develop and package loan and grant applications for FLH under the Section 514 and Section 516 programs (see Section IV. Application and Submission Information). In addition, applicants must possess the ability to exercise leadership, organize work, and prioritize assignments to meet work demands in a timely and cost efficient manner. The applicant may arrange for other non-profit agencies to provide services on its behalf; however, the RHS will expect the applicant to provide the overall management necessary to ensure the objectives of the grant are met. Non-profit agencies acting on behalf of the applicant must also meet the eligibility requirements stated above.

Cost Sharing or Matching: Cost sharing is not applicable to this program.

Minimum Performance Requirements

(1) Applicants shall conduct outreach to broad-based non-profit organizations, non-profit organizations of farmworkers, federally recognized Indian tribes, agencies or political subdivisions of State or local Government, public agencies (such as housing authorities) and other eligible FLH organizations to further the Section 514 and Section 516 FLH programs. Outreach will consist of a minimum of 12 informational presentations to the general public annually to inform them about the Section 514 Section and 516 FLH programs.

(2) Applicants shall conduct at least 12 one-on-one meetings annually with groups who are interested in applying for FLH loans or grants and assist such groups with the loan and grant application process.

(3) Applicants shall assist loan and grant applicants secure funding from other sources for the purpose of leveraging those funds with RHS funds.

(4) Applicants shall provide technical assistance during the development and construction phase of FLH proposals selected for funding.

(5) When submitting a grant proposal, applicants need not identify the geographic location of the places they intend to target for their outreach activities, however, applicants must commit to targeting at least five areas within the grant proposal's region. All targeted areas must be distinct market areas and not be overlapping. At least four of the targeted areas must be in different States. If the proposal is selected for funding, the applicant will be required to consult with each Rural Development State Director in the proposal's region for the purpose of developing their list of targeted areas. When determining which areas to target, consideration will be given to (a) the total number of farmworkers in the area, (b) the number of farmworkers in that area who lack adequate housing, (c) the percentage of the total number of farmworkers that are without adequate housing, and (d) areas which have not recently had a Section 514 or Section 516 loan or grant funded for new construction. In addition, if selected for funding, the applicant will be required to revise their Statement of Work to identify the geographic location of the targeted areas and will submit their revised Statement of Work to the National Office approval. When submitted for approval, the applicant must also submit a summary of their consultation with the Rural Development State Directors. At grant closing, the revised Statement of Work will be attached to, and become a part of, the grant agreement.

(6) During the grant period, each applicant must submit a minimum number of loan application packages to the Agency for funding consideration. The minimum number shall be the greater of (a) at least nine loan application packages for the Eastern and Western Regions and at least seven for the Central Region or, (b) a total number of loan application packages that is equal to 70 percent of the number of areas the applicant's proposal committed to targeting. Fractional percentages shall be rounded up to the next whole number. For example, if the applicant's proposal committed to targeting 13 areas, then the applicant must submit at least 10 loan application packages during the grant period (13 areas × 70 percent = 9.1 rounded up to 10). The disbursement of grant funds during the grant period will be contingent upon the applicant making progress in meeting this minimum performance requirement. More than one application package for the same market area will not be considered unless the applicant submits documentation of the need for more than one FLH facility.

(7) Provide training to applicants of FLH loans and grants to assist them in their ability to manage FLH.

IV. Application and Submission Information

Intergovernmental Review. The Technical Assistant program is not subject to the provisions of Executive Order 12372, which require intergovernmental consultation with State and local officials. Expenses incurred in applying for this Notice will be borne by and be at the applicant's risk.

The application process will be in two phases; the initial application (or proposal) and the submission of a formal application. Only those proposals that are selected for funding will be invited to submit formal applications. All proposals must include the following:

(1) A summary page listing the following items. This information should be double-spaced between items and not be in narrative form.

a. Applicant's name,

b. Applicant's Taxpayer Identification Number,

c. Applicant's address,

d. Applicant's telephone number,

e. Name of applicant's contact person, telephone number, and address,

f. Amount of grant requested,

g. The FLH–TA grant region for which the proposal is submitted (*i.e.,* Eastern, Central, or Western Region), and

h. *Address unique entity identifier and System for Award Management (SAM).* As part of the application, all applicants, except for individuals or agencies excepted under 2 CFR 25.110(d), must be: (1) Registered in the System for Award Management (SAM); (2) provide a valid unique entity identifier in its applications; and (3) maintain an active SAM registration with current information at all times during which it has an active Federal award or application. An award may not be made to the applicant until the applicant has complied with the unique entity identifier and SAM requirements.

(2) A narrative describing the applicant's ability to meet the eligibility requirements stated in this Notice. If the applicant intends to have other agencies working on their behalf, the narrative must identify those agencies and address their ability to meet the stated eligibility requirements.

(3) A detailed Statement of Work covering a 3-year period that contains measurable monthly and annual accomplishments. The applicant's Statement of Work is a critical component of the selection process. The Statement of Work must include an outreach component describing the applicant's activities to inform potentially eligible groups about the Section 514 and Section 516 FLH program. The outreach component must include a schedule of their planned outreach activities and must be included in a manner so that performance can be measured. In addition, the outreach activities must be coordinated with the appropriate RHS State Office and meet the minimum performance requirements as stated in the Scope of Work section of this Notice. The Statement of Work must state *how many* areas the applicant will target for their outreach activities (Note: If selected for funding, the applicant will be required to revise their Statement of Work, after consultation with Rural Development State Directors, to *identify the areas* that will be targeted). The Statement of Work must also include a component for training organizations on the application process and the long-term management of FLH. The Statement of Work will also describe the applicant's plans to access other funding for the development and construction of FLH and their experience in obtaining such funding. The Statement of Work must describe any duties or activities that will be performed by other agencies on behalf of the applicant.

(4) An organizational plan that includes a staffing chart complete with name, job title, salary, hours, timelines, and descriptions of employee duties to achieve the objectives of the grant program.

(5) Organizational documents and financial statements to evidence the applicant's status as a properly organized private or public non-profit agency and the financial ability to carry out the objectives of the grant program. If other agencies will be working on behalf of the applicant, working agreements between the applicant and those agencies must be submitted as part of the proposal and any associated cost must be included in the applicant's budget. Organizational and financial statements must also be submitted as part of the application for any agencies that will be working on behalf of the applicant to document the eligibility of those organizations.

(6) A detailed budget plan projecting the monthly and annual expenses the applicant will incur. Costs will be limited to those that are allowed under 2 CFR part 200.

(7) To insure that funds are equitably distributed and that there is no duplication of efforts on related projects, all applicants are to submit a list of projects they are currently involved with, whether publicly or privately supported, that are or may be, related to the objectives of this grant. In addition, the same disclosure must be provided for any agencies that will be working on behalf of the applicant.

(8) The applicant must include a narrative describing its knowledge, demonstrated ability, or practical experience in providing training and technical assistance to applicants of loans or grants for the development of multi-family or farmworker housing. The applicant must identify the type of assistance that was applied for (loan or grant, tax credits, leveraged funding, etc.), the number of times they have provided such assistance, and the success ratio of their applications. In addition, information must be provided concerning the number of housing units, their size, their design, and the amount of grant and loan funds that were secured.

(9) A narrative describing the applicant's knowledge and demonstrated ability in estimating development and construction costs of multi-family or farm labor housing and for obtaining the necessary permits and clearances.

(10) A narrative describing the applicant's ability and experience in overcoming community opposition to FLH and describing the methods and techniques that they will use to overcome any such opposition, should it occur.

(11) A separate one-page information sheet listing each of the "Application Scoring Criteria" contained in this Notice, followed by the page numbers of all relevant material and documentation that is contained in the proposal that supports these criteria.

V. Application Review Information

The initial application (or proposal) evaluation process designed for this RFP will consist of two phases. The first phase will evaluate the applicant's Statement of Work and the degree to which it sets forth measurable objectives that are consistent with the objectives of FLH–TA grant program. The second phase will evaluate the applicant's knowledge and ability to provide the management necessary for carrying out a FLH–TA grant program. Proposals will only compete against other proposals within the same region. Selection points will be awarded as follows:

Phase I—Statement of Work

The Statement of Work will be evaluated to determine the degree to which it outlines efficient and measurable monthly and annual outcomes as follows:

a. The minimum performance requirements of this Notice require that the applicant commit to targeting at least five areas (at least four of which are in different States). The more areas the applicant commits to targeting, the more scoring points they will be awarded. As stated earlier in this Notice, the more areas the applicant commits to the more loan application packages must be submitted. The amount will be established in the Statement of Work. The number of areas within the region that the applicant has committed to targeting for outreach activities:

(1) 5–7 targeted areas: 0 points
(2) 8 targeted areas: 5 points
(3) 9–10 targeted areas: 10 points
(4) 11–12 targeted areas: 15 points
(5) 13 or more areas: 20 points

a. RHS wants the applicant to cover as much of the grant region as possible. RHS does not want the applicant's efforts to be concentrated in a limited number of States. For this reason, additional points will be awarded to grant proposals that target areas in more than four States (the minimum requirement is four). Applications only compete within their grant region. The grant proposal commits to targeting areas in the following number of States:

(1) 4 States: 0 points
(2) 5 States: 5 points
(3) 6 States: 10 points
(4) 7 States: 15 points
(5) More than 7 States: 20 points

Phase II—Project Management

a. The number of successful multi-family or FLH loan or grant applications the applicant entity has assisted in developing and packaging:

(1) 0–5 applications: 0 points
(2) 6–10 applications: 10 points
(3) 11–15 applications: 20 points
(4) 16 or more applications: 30 points

b. The number of groups seeking loans or grants for the development of multi-family or FLH projects that the applicant entity has provided training and technical assistance.

(1) 0–5 groups: 0 points
(2) 6–10 groups: 5 points
(3) 11–15 groups: 10 points
(4) 16 or more groups: 15 points

c. The number of multi-family or FLH projects for which the applicant entity has assisted in estimating development and construction costs and obtaining the necessary permits and clearances:

(1) 0–5 projects: 0 points
(2) 6–10 projects: 5 points
(3) 11–15 projects: 10 points
(4) 16 or more projects: 15 points

d. The number of times the applicant entity has encountered community opposition *and* was able to overcome that opposition so that farm labor housing was successfully developed.

(1) 0–2 times: 0 points
(2) 2–5 times: 5 points
(3) 6–10 times: 10 points
(4) 11 or more times: 15 points

e. The number of times the applicant entity has been able to leverage funding from two or more sources for the development of a multi-family or FLH project.

(1) 0–5 times: 0 points
(2) 6–10 times: 5 points
(3) 11–15 times: 10 points
(4) 16 or more times: 15 points

f. The number of FLH projects that the applicant entity has assisted with on-going management (*i.e.*, rent-up, maintenance, etc.):

(1) 0–5 FLH projects: 0 points
(2) 6–10 FLH projects: 5 points
(3) 11–15 FLH projects: 10 points
(4) 16 or more FLH projects: 15 points

The National Office will rank all pre-applications by region and distribute funds to the regions in rank order and within funding limits.

Tie Breakers—In the event two or more proposals within a region are scored with an equal amount of points, selections will be made in the following order:

(1) If an applicant has already had a proposal selected, their proposal will not be selected.

(2) If all or none of the applicants with equivalent scores have already had a proposal selected, the lowest cost proposal will be selected.

(3) If two or more proposals have equivalent scores, all or none of the applicants have already had a proposal selected, and the cost is the same, a proposal will be selected by a random lottery drawing.

RHS will notify all applicants whether their pre-applications have been accepted or rejected and provide appeal rights under 7 CFR part 11, as appropriate.

Reporting. Post-award reporting requirements can be found in the Grant Agreement.

Paperwork Reduction Act

The reporting requirements contained in this Notice have been approved by the Office of Management and Budget (OMB) under Control Number 0575–0181.

Non-Discrimination Requirements

The U.S. Department of Agriculture prohibits discrimination in all of its programs and activities on the basis of race, color, national origin, age, disability, and where applicable, sex, marital status, familial status, parental status, religion, sexual orientation, political beliefs, genetic information, reprisal, or because all or part of an individual's income is derived from any public assistance program. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720–2600 (voice and TDD).

To file a complaint of discrimination, write to USDA, Assistant Secretary for Civil Rights, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW., STOP 9410, Washington, DC 20250–9410, or call toll free at (866) 632–9992 (English) or (800) 877–8339 (TDD) or (866) 377–8642 (English Federal—Relay) or (800) 845–6136 (Spanish Federal—Relay). "USDA is an equal opportunity provider, employer, and lender."

Dated: May 13, 2016.

Tony Hernandez,

Administrator, Rural Housing Service.

[FR Doc. 2016–12068 Filed 5–20–16; 8:45 am]

BILLING CODE 3410–XV–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–2–2016]

Authorization of Production Activity; Foreign-Trade Subzone 249A; GE Generators (Pensacola) L.L.C.; (Wind Turbine Nacelles and Hubs); Pensacola, Florida

On January 8, 2016, GE Generators (Pensacola) L.L.C., operator of Subzone 249A, submitted a notification of proposed production activity to the Foreign-Trade Zones (FTZ) Board for its facility in Pensacola, Florida.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (81 FR 3781, January 22, 2016). The FTZ Board has determined that no further review of the activity is warranted at this time. The production activity described in the notification is authorized, subject to the FTZ Act and the FTZ Board's regulations, including Section 400.14.

Dated: May 16, 2016.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2016–12007 Filed 5–20–16; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–888]

Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof From the People's Republic of China: Notice of Court Decision Not in Harmony With Final Results and Notice of Amended Final Results of the Antidumping Duty Administrative Review; 2007–2008

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: On April 7, 2016, the United States Court of International Trade (the CIT or the Court) issued final judgment in *Foshan Shunde Yongjian Housewares & Hardwares Co., Ltd. and Polder Inc.* v. *United States*, Court No. 10–00059, sustaining the Department of Commerce's (the Department) final results of the third redetermination pursuant to remand.[1] Consistent with

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[1] *See* Final Results of Redetermination Pursuant to Court Remand, Floor Standing Metal Top Ironing Tables and Certain Parts Thereof from the People's Republic of China, *Foshan Shunde Yongjian Housewares & Hardwares Co., Ltd. and Polder Inc.*

Continued

the decision of the United States Court of Appeals for the Federal Circuit (Federal Circuit) in *Timken Co., v United States,* 893 F.2d 337 (Fed. Cir. 1990) (*Timken*), as clarified by *Diamond Sawblades Mfrs. Coalition* v. *United States,* 626 F.3d 1374 (Fed. Cir. 2010) (*Diamond Sawblades*), the Department is notifying the public that the final judgment in this case is not in harmony with the Department's final results of the antidumping duty administrative review of floor-standing, metal top ironing tables and certain parts thereof from the People's Republic of China covering the period August 1, 2007, through July 31, 2008, and is amending the final results with respect to the weighted-average dumping margin assigned to Foshan Shunde Yongjian Housewares & Hardwares Co., Ltd. (Foshan Shunde).[2]

DATES: Effective April 18, 2016.

FOR FURTHER INFORMATION CONTACT: Michael J. Heaney or Robert James, AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–4475 or (202) 482–0649, respectively.

SUPPLEMENTARY INFORMATION:

Background

On January 20, 2010, the Department published its *Final Results.*[3] On March 17, 2010, Foshan Shunde, an exporter of the subject merchandise, and Polder, Inc., an importer of the subject merchandise, timely filed a complaint with the CIT to challenge certain aspects of the *Final Results.* The litigation history of this procedure is outlined below.

On October 12, 2011, the Court remanded the matter.[4] On June 12, 2012, the Department issued its First Redetermination, in which it determined that Foshan Shunde was: (1) Entitled to a separate rate and (2) assigned an adverse facts available (AFA) rate of 157.68 percent to Foshan Shunde.[5]

Upon consideration of the First Redetermination, on April 8, 2013, the Court affirmed our assignment of a separate rate to Foshan Shunde.[6] The Court, however, remanded the case to the Department to reconsider its corroboration of the 157.68 percent rate assigned to Foshan Shunde. On July 8, 2013, the Department issued its Second Redetermination, in which it explained that available Customs data corroborated to the extent practicable the 157.68 percent rate assigned to Foshan Shunde.[7]

On June 20, 2014, the Court rejected the corroboration analysis conducted by the Department in its Second Redetermination. The Court remanded the Department's corroboration of Foshan Shunde's AFA rate for further consideration.[8]

On October 10, 2014, the Department filed its Third Redetermination, in which it, under protest, assigned a revised AFA rate of 72.29 percent to Foshan Shunde.[9] This 72.29 percent rate was the rate assigned to Separate Rate companies in the less-than-fair value investigation.[10] On April 7, 2016, the Court sustained the Department's *Third Redetermination,* and entered final judgment.[11]

Timken Notice

In its decision in *Timken,* 893 F.2d at 341, as clarified by *Diamond Sawblades,* the Federal Circuit has held that, pursuant to section 516A(e) of the Tariff Act of 1930, as amended (the Act), the Department must publish a notice of a court decision not "in harmony" with a Department determination, and must suspend liquidation of entries pending a "conclusive" court decision. The Court's April 7, 2016, judgment sustaining the Third Redetermination constitutes a final decision of the Court that is not in harmony with the Department's *Final Results.* This notice is published in fulfillment of the publication requirement of *Timken.* Accordingly, the Department will continue the suspension of liquidation of the subject merchandise pending the expiration of the period of appeal or, if appealed, pending a final and conclusive court decision.

Amended Final Results

Because there is now a final court decision, the Department amends the *Final Results* with respect to the dumping margin of Foshan Shunde. The revised weighted-average dumping margin for Foshan Shunde during the period August 1, 2007, through July 31, 2008, is as follows:

Exporter	Weighted average dumping margin (percent)
Foshan Shunde Yongjian Housewares & Hardwares Co., Ltd	72.29

For Foshan Shunde, the cash deposit rate will remain the rate established in the *2010–2011 Final Results,* a subsequent review, which is 157.68 percent.[12]

In the event the Court's ruling is not appealed, or if appealed and upheld by the Federal Circuit, the Department will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on entries of the subject merchandise exported by Since Hardware and Foshan Shunde using the revised assessment rate calculated by the Department in the *Third Redetermination.*

This notice is issued and published in accordance with sections 516(A)(e), 751(a)(1), and 777(i)(1) of the Act.

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v. *United States,* Court No. 10–00059, Slip Op. 14–69 (CIT June 25, 2014), dated October 10, 2014 (Third Redetermination), available at *http://enforcement.trade.gov/remands/index.htm.*

[2] *See Floor-Standing Metal-Top Ironing Tables and Certain Parts Thereof From the People's Republic of China: Final Results of Antidumping Duty Administrative Review,* 75 FR 3201(January 20, 2010), and accompanying Issues and Decision Memorandum (*Final Results*).

[3] *Id.*

[4] *Foshan Shunde Yongjian Housewares & Hardwares Co., Ltd., and Polder Inc.* v. *United States,* Court No. 10–00059, Slip. Op. 11–123 (October 12, 2011) (*Foshan Shunde I*).

[5] *See* Final Results of Redetermination Pursuant to Court Remand Floor Standing Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China Foshan Shunde Yongjian Housewares & Hardwares Co., Ltd., and Polder Inc. v. United States, dated June 12, 2012 (First Redetermination).

[6] *See Foshan Shunde Yongjian Housewares & Hardwares Co., Ltd., and Polder Inc.* v. *United States,* Court No. 10–00059, Slip Op. 13–47 (April 8, 2013) (*Foshan Shunde II*).

[7] *See* Final Results of Redetermination Pursuant to Court Remand Floor Standing Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China Foshan Shunde Yongjian Housewares & Hardwares Co., Ltd., and Polder Inc. v. United States, dated July 8, 2013 (Second Redetermination).

[8] *See Foshan Shunde Yongjian Housewares & Hardwares Co., Ltd., and Polder Inc.* v. *United States,* Court No. 10–00059, Slip Op. 14–69 (June 20, 2014) (*Foshan Shunde III*).

[9] *See* Final Results of Redetermination Pursuant to Court Remand Floor Standing Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China Foshan Shunde Yongjian Housewares & Hardwares Co., Ltd., and Polder Inc. v. United States, dated October 10, 2014 (Third Redetermination).

[10] *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Floor Standing Metal-Top Ironing Tables and Certain Parts Thereof From the People's Republic of China* 69 FR 47868 (August 6, 2004).

[11] *See Foshan Shunde Yongjian Housewares & Hardwares Co., Ltd., and Polder Inc.* v. *United States,* Court No. 10–00059, Slip Op. 16–35 (April 7, 2016).

[12] *See Floor Standing Metal-Top Ironing Tables and Certain Parts Thereof From the People's Republic of China: Final Results of Antidumping Duty Administrative Review* 77 FR 55806, (September 11, 2012) (*2010–2011 Final Results*).

Dated: May 13, 2016.

Paul Piquado,

Assistant Secretary, for Enforcement & Compliance.

[FR Doc. 2016–12004 Filed 5–20–16; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–971]

Multilayered Wood Flooring From the People's Republic of China: Final Results and Partial Rescission of Countervailing Duty Administrative Review; 2013

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) completed its administrative review of the countervailing duty (CVD) order on multilayered wood flooring (wood flooring) from the People's Republic of China (PRC). The period of review (POR) is January 1, 2013, through December 31, 2013. We find that the mandatory respondents, Dalian Penghong Floor Products Co., Ltd. (Penghong) and The Lizhong Wood Industry Limited Company of Shanghai (Lizhong) (also known as "Shanghai Lizhong Wood Products Co., Ltd."), received countervailable subsidies during the POR. The final net subsidy rates are listed below in "Final Results of Administrative Review." We are also rescinding the review for five companies that timely certified that they made no shipments of subject merchandise during the POR.

DATES: Effective May 23, 2016.

FOR FURTHER INFORMATION CONTACT: Mary Kolberg, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–1785.

Background

On January 11, 2016, the Department published the *Preliminary Results* of this administrative review.[1] In the *Preliminary Results,* we stated our intent to rescind the review for the seven companies that certified that they made no shipments of subject merchandise during the POR, provided we did not receive information from Customs and Border Protection (CBP) which contradicted these companies' claims of no sales, shipments, or entries of subject merchandise to the United States during the POR. On February 22, 2016, CBP notified the Department that Linyi Bonn Flooring Manufacturing Co., Ltd. (Linyi Bonn), and Changbai Mountain Development and Protection Zone Hongtu Wood Industrial Co., Ltd. (Changbai Mountain) made shipments to the United States. On February 26, 2016, and March 11, 2016, respectively, these two companies, withdrew their certifications of no shipments.[2]

We issued an additional supplemental questionnaire to Lizhong on January 12, 2016, and received a response on January 22, 2016.[3] On February 17, 2016, we received case briefs from Fine Furniture (Shanghai) Limited (Fine Furniture) and Penghong.[4] No party filed a rebuttal brief.

Scope of the Order

Multilayered wood flooring is composed of an assembly of two or more layers or plies of wood veneer(s)[5] in combination with a core. Imports of the subject merchandise are provided for under the following subheadings of the Harmonized Tariff Schedule of the United States (HTSUS): 4412.31.0520; 4412.31.0540; 4412.31.0560; 4412.31.2510; 4412.31.2520; 4412.31.4040; 4412.31.4050; 4412.31.4060; 4412.31.4070; 4412.31.5125; 4412.31.5135; 4412.31.5155; 4412.31.5165; 4412.31.6000; 4412.31.9100; 4412.32.0520; 4412.32.0540; 4412.32.0560; 4412.32.2510; 4412.32.2520; 4412.32.3125; 4412.32.3135; 4412.32.3155; 4412.32.3165; 4412.32.3175; 4412.32.3185; 4412.32.5600; 4412.39.1000; 4412.39.3000; 4412.39.4011; 4412.39.4012; 4412.39.4019; 4412.39.4031; 4412.39.4032; 4412.39.4039; 4412.39.4051; 4412.39.4052; 4412.39.4059; 4412.39.4061; 4412.39.4062; 4412.39.4069; 4412.39.5010; 4412.39.5030; 4412.39.5050; 4412.94.1030; 4412.94.1050; 4412.94.3105; 4412.94.3111; 4412.94.3121; 4412.94.3131; 4412.94.3141; 4412.94.3160; 4412.94.3171; 4412.94.4100; 4412.94.5100; 4412.94.6000; 4412.94.7000; 4412.94.8000; 4412.94.9000; 4412.94.9500; 4412.99.0600; 4412.99.1020; 4412.99.1030; 4412.99.1040; 4412.99.3110; 4412.99.3120; 4412.99.3130; 4412.99.3140; 4412.99.3150; 4412.99.3160; 4412.99.3170; 4412.99.4100; 4412.99.5100; 4412.99.5710; 4412.99.6000; 4412.99.7000; 4412.99.8000; 4412.99.9000; 4412.99.9500; 4418.71.2000; 4418.71.9000; 4418.72.2000; and 4418.72.9500.

While HTSUS subheadings are provided for convenience and customs purposes, the written product description remains dispositive.

A full description of the scope of the order is contained in the memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Enforcement and Compliance, "Decision Memorandum for Final Results of Countervailing Duty Administrative Review: Multilayered Wood Flooring from the People's Republic of China" dated concurrently with this notice (Decision Memorandum), which is hereby adopted by this notice.

Analysis of Comments Received

All issues raised in the parties' briefs are addressed in the Decision Memorandum. A list of the issues raised is attached to this notice at Appendix I. The Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov* and in the Central Records Unit, Room B8024 of the main Department building. In addition, a complete version of the Decision Memorandum can be accessed directly on the Internet at *https://enforcement.trade.gov/frn.* The signed Decision Memorandum and the electronic versions of the Decision Memorandum are identical in content.

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[1] *See Multilayered Wood Flooring From the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review and Intent To Rescind the Review in Part; 2013,* 81 FR 1169 (January 11, 2016) (*Preliminary Results*).

[2] *See* letter from Linyi Bonn Flooring Manufacturing Co., Ltd., re: "Correction of Information and Withdrawal of No Shipment Statement" dated February 26, 2016; *see also* letter from Changbai Mountain Development and Protection Zone Hongtu Wood Industrial Co., Ltd., re: "Multilayered Wood Flooring from The People's Republic of China: Supplemental Questionnaire Response" dated March 11, 2016.

[3] *See* letter from Lizhong re: "Multilayered Wood Flooring from the People's Republic of China: Lizhong's Response to the Third Supplemental Countervailing Duty Questionnaire," (January 22, 2016) (L3SQR).

[4] *See* letter from Fine Furniture, re: "Administrative Review of the Countervailing Duty Order on Multilayered Wood Flooring from the People's Republic of China: Case Brief" dated February17, 2016; *see also* letter from Penghong, re: "*Multilayered Wood Flooring from the People's Republic of China Dalian Penghong Case Brief*" dated February 17, 2016.

[5] A "veneer" is a thin slice of wood, rotary cut, sliced or sawed from a log, bolt or flitch. Veneer is referred to as a ply when assembled.

Partial Rescission of Administrative Review

We received timely filed no-shipment certifications from Zhejiang Shuimojiangnan New Material Technology Co., Ltd., Tongxiang Jisheng Import and Export Co., Ltd., Jiangsu Guyu International Trading Co., Ltd., Jiangsu Mingle Flooring Co., Ltd., Shenyang Senwang Wooden Industry Co., Ltd., Changbai Mountain, and Linyi Bonn.[6] We received from CBP evidence that Changbai Mountain and Linyi Bonn made shipments to the United States during the POR. Both companies subsequently withdrew their certifications of no shipments, and remain subject to this administrative review. The Department is rescinding the administrative review of Zhejiang Shuimojiangnan New Material Technology Co., Ltd., Tongxiang Jisheng Import and Export Co., Ltd., Jiangsu Guyu International Trading Co., Ltd., Jiangsu Mingle Flooring Co., Ltd., and Shenyang Senwang Wooden Industry Co., Ltd.

Methodology

We conducted this review in accordance with section 751(a)(1)(A) of the Tariff Act of 1930, as amended (the Act). For each of the subsidy programs found to be countervailable, we find that there is a subsidy, *i.e.*, a government-provided financial contribution that gives rise to a benefit to the recipient, and that the subsidy is specific.[7] For a full description of the methodology underlying our conclusions, *see* Decision Memorandum.

Final Results of Administrative Review

In accordance with 19 CFR 351.221(b)(4)(i), we calculated a countervailable subsidy rate for each of the mandatory respondents, Penghong and Lizhong.

For the non-selected respondents, we followed the Department's practice, which is to base the subsidy rates on an average of the subsidy rates calculated for those companies selected for individual review, excluding *de minimis* rates or rates based entirely on adverse facts available.[8] In this case, we assigned to the non-selected respondents the simple average of the rates calculated for Penghong and Lizhong. We are using a simple, rather than a weighted, average due to inconsistent units of measure in the publicly ranged quantity and value data provided by Penghong and Lizhong.

We find the countervailable subsidy rates for the producers/exporters under review to be as follows:[9]

Producer/exporter	Net subsidy rate (percent)
Dalian Penghong Floor Products Co., Ltd. (Penghong)	1.83
Shanghai Lizhong Wood Products Co., Ltd. (aka The Lizhong Wood Industry Limited Company of Shanghai); Linyi Youyou Wood Co., Ltd	0.92
A&W (Shanghai) Woods Co., Ltd	1.38
Anhui Longhua Bamboo Product Co., Ltd	1.38
Armstrong Wood Products (Kunshan) Co., Ltd	1.38
Baishan Huafeng Wood Product Co., Ltd	1.38
Baiying Furniture Manufacturer Co., Ltd	1.38
Baroque Timber Industries (Zhongshan) Co., Ltd	1.38
Benxi Wood Company	1.38
Changbai Mountain Development and Protection Zone Hongtu Wood Industrial Co., Ltd	1.38
Changzhou Hawd Flooring Co., Ltd	1.38
Cheng Hang Wood Co., Ltd	1.38
Chinafloors Timber (China) Co., Ltd	1.38
Dalian Dajen Wood Co., Ltd	1.38
Dalian Huade Wood Product Co., Ltd	1.38
Dalian Huilong Wooden Products Co., Ltd	1.38
Dalian Jiuyuan Wood Industry Co., Ltd	1.38
Dalian Kemian Wood Industry Co., Ltd	1.38
Dalian Shumaike Floor Manufacturing Co., Ltd	1.38
Dalian Xinjinghua Wood Co., Ltd	1.38
Dasso Industrial Group Co., Ltd	1.38
Dazhuang Floor Co. (dba Dasso Industrial Group Co., Ltd.)	1.38
Dongtai Fuan Universal Dynamics LLC	1.38
Dun Hua City Jisen Wood Industry Co., Ltd	1.38
Dun Hua Sen Tai Wood Co., Ltd	1.38
Dunhua City Dexin Wood Industry Co., Ltd	1.38
Dunhua City Hongyuan Wood Industry Co., Ltd	1.38
Dunhua City Wanrong Wood Industry Co., Ltd	1.38
Dunhua Jisheng Wood Industry Co., Ltd	1.38
Dunhua Shengda Wood Industry Co., Ltd	1.38
Era Solar Co., Ltd	1.38
Fine Furniture (Shanghai) Limited	1.38
Fu Lik Timber (HK) Co., Ltd	1.38

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[6] *See* letter from Zhejiang Shuimojiangnan New Material Technology Co., Ltd., "Multilayered Wood Flooring from the People's Republic of China-No Sales Certification," dated April 3, 2015; *see also* letter from Tongxiang Jisheng Import and Export Co., Ltd., Jiangsu Guyu International Trading Co, Ltd., Jiangsu Mingle Flooring CO., Ltd., Shenyang Senwang Wooden Industry Co., Ltd., Changbai Mountain Development and Protection Zone Hongtu Wood Industrial Co., Ltd., and Linyi Bonn Flooring Manufacturing Co., Ltd., "Multilayered Wood Flooring from the People's Republic of China: Submission of No Shipment Certifications," dated April 6, 2015.

[7] *See* sections 771(5)(B) and (D) of the Act regarding financial contribution; section 771(5)(E) of the Act regarding benefit; and, section 771(5A) of the Act regarding specificity.

[8] *See, e.g., Certain Pasta from Italy: Preliminary Results of the 13th (2008) Countervailing Duty Administrative Review*, 75 FR 18806, 18811 (April 13, 2010), unchanged in *Certain Pasta from Italy: Final Results of the 13th (2008) Countervailing Duty Administrative Review*, 75 FR 37386 (June 29, 2010).

[9] The Department published a Correction of Notice of Initiation, 80 FR 11166 (March 2, 2015) and removed Zhejiang Layo Wood Industry Co. Ltd.("Layo Wood") because this company was excluded from the countervailing duty order in the investigation.

Producer/exporter	Net subsidy rate (percent)
Fusong Jinlong Wooden Group Co., Ltd	1.38
Fusong Qianqiu Wooden Product Co., Ltd	1.38
GTP International Ltd	1.38
Guangdong Fu Lin Timber Technology Limited	1.38
Guangdong Yihua Timber Industry Co., Ltd	1.38
Guangzhou Homebon Timber Manufacturing Co., Ltd	1.38
Guangzhou Panyu Kangda Board Co., Ltd	1.38
Guangzhou Panyu Shatou Trading Co., Ltd	1.38
Guangzhou Panyu Southern Star Co., Ltd	1.38
HaiLin LinJing Wooden Products, Ltd	1.38
HaiLin XinCheng Wooden Products, Ltd	1.38
Hangzhou Dazhuang Floor Co., Ltd. (dba Dasso Industrial Group Co., Ltd.)	1.38
Hangzhou Hanje Tec Co., Ltd	1.38
Hangzhou Zhengtian Industrial Co., Ltd	1.38
Henan Xingwangjia Technology Co., Ltd	1.38
Hunchun Forest Wolf Wooden Industry Co., Ltd	1.38
Hunchun Xingjia Wooden Flooring Inc	1.38
Huzhou Chenghang Wood Co., Ltd	1.38
Huzhou Fulinmen Imp. & Exp. Co., Ltd	1.38
Huzhou Fuma Wood Co., Ltd	1.38
Huzhou Jesonwood Co., Ltd	1.38
Huzhou Ruifeng Imp. & Exp. Co., Ltd	1.38
Huzhou Sunergy World Trade Co., Ltd	1.38
Jiafeng Wood (Suzhou) Co, Ltd	1.38
Jiangsu Senmao Bamboo and Wood Industry Co., Ltd	1.38
Jiangsu Simba Flooring Co., Ltd	1.38
Jiangsu Yuhui International Trade Co., Ltd	1.38
Jiashan HuiJiaLe Decoration Material Co., Ltd	1.38
Jiaxing Hengtong Wood Co., Ltd	1.38
Jilin Forest Industry Jinqiao Flooring Group Co., Ltd	1.38
Jilin Xinyuan Wooden Industry Co., Ltd	1.38
Karly Wood Product Limited	1.38
Kemian Wood Industry (Kunshan) Co., Ltd	1.38
Linyi Anying Wood Co., Ltd	1.38
Linyi Bonn Flooring Manufacturing Co., Ltd	1.38
Mudanjiang Bosen Wood Industry Co., Ltd	1.38
Nakahiro Jyou Sei Furniture (Dalian) Co., Ltd	1.38
Nanjing Minglin Wooden Industry Co., Ltd	1.38
Ningbo Qixin Solar Electrical Appliance Co., Ltd	1.38
Ningbo Tianyi Bamboo & Wood Products Co., Ltd	1.38
Pinge Timber Manufacturing (Zhejiang) Co., Ltd	1.38
Power Dekor Group Co., Ltd	1.38
Puli Trading Limited	1.38
Qingdao Barry Flooring Co., Ltd	1.38
Riverside Plywood Corporation	1.38
Samling Riverside Co., Ltd	1.38
Shanghai Anxin (Weiguang) Timber Co., Ltd	1.38
Shanghai Eswell Timber Co., Ltd	1.38
Shanghai Lairunde Wood Co., Ltd	1.38
Shanghai New Sihe Wood Co., Ltd	1.38
Shanghai Shenlin Corporation	1.38
Shenyang Haobainian Wooden Co., Ltd	1.38
Shenzhenshi Huanwei Woods Co., Ltd	1.38
Sino-Maple (JiangSu) Co., Ltd	1.38
Suzhou Anxin Weiguang Timber Co., Ltd	1.38
Suzhou Dongda Wood Co., Ltd[10]	1.38
Vicwood Industry (Suzhou) Co. Ltd	1.38
Xiamen Yung De Ornament Co., Ltd	1.38
Xuzhou Antop International Trade Co., Ltd	1.38
Xuzhou Shenghe Wood Co., Ltd	1.38
Yekalon Industry, Inc	1.38
Yingyi-Nature (Kunshan) Wood Industry Co., Ltd	1.38
Yixing Lion-King Timber Industry Co., Ltd	1.38
Zhejiang Anji Xinfeng Bamboo and Wood Co., Ltd	1.38
Zhejiang Biyork Wood Co., Ltd	1.38
Zhejiang Dadongwu GreenHome Wood Co., Ltd	1.38
Zhejiang Desheng Wood Industry Co., Ltd	1.38
Zhejiang Fudeli Timber Industry Co., Ltd	1.38
Zhejiang Fuerjia Wooden Co., Ltd	1.38
Zhejiang Fuma Warm Technology Co., Ltd	1.38
Zhejiang Haoyun Wooden Co., Ltd	1.38
Zhejiang Jeson Wood Co., Ltd	1.38
Zhejiang Longsen Lumbering Co., Ltd	1.38

Producer/exporter	Net subsidy rate (percent)
Zhejiang Shiyou Timber Co., Ltd	1.38
Zhejiang Tianzhen Bamboo & Wood Development Co., Ltd	1.38

Assessment Rates

Consistent with 19 CFR 351.212(b)(2), we intend to issue assessment instructions to U.S. Customs and Border Protection (CBP) fifteen days after publication of the final results of this review. We will instruct CBP to assess countervailing duties on all appropriate entries covered by this review in the amounts shown above.

Cash Deposit Requirements

In accordance with section 751(a)(1) of the Act, the Department intends to instruct CBP to collect cash deposits of estimated countervailing duties in the amounts shown above on shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this review. For all non-reviewed firms, we will instruct CBP to continue to collect cash deposits at the most recent company specific or all-others rate applicable to the company. Accordingly, the cash deposit rates that will be applied to companies covered by the *Amended Order,* but not examined in this review, are those established in the most recently completed segment of the proceeding for each company. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Administrative Protective Order

This notice serves as a final reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing these results in accordance with sections 751(a)(l) and 777(i)(l) of the Act and 19 CFR 351.213.

Dated: May 13, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

Appendix—List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Changes Since the Preliminary Results
IV. Scope of the Order
V. Partial Rescission of Administrative Review
VI. Analysis of Comments
  Comment 1: Whether the Department Should Include the Name of Fine Furniture's Affiliate, Double F Limited (Double F), in Its Instructions to U.S. Customs and Border Protection (CBP)
  Comment 2: Whether Penghong's Electricity Rates Are Calculated Incorrectly
VII. Recommendation

[FR Doc. 2016–12005 Filed 5–20–16; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE640

Fisheries of the Gulf of Mexico; Southeast Data, Assessment, and Review (SEDAR); Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of SEDAR 49 post-workshop webinar for Gulf of Mexico Data-limited Species.

SUMMARY: The SEDAR 49 assessment of the Gulf of Mexico Data-limited Species will consist of two in-person workshops and a series of webinars. See **SUPPLEMENTARY INFORMATION.**

DATES: The SEDAR 49 post-workshop webinar will be held from 1 p.m. to 3 p.m. on June 7, 2016.

ADDRESSES: The meeting will be held via webinar. The webinar is open to members of the public. Those interested in participating should contact Julie A. Neer at SEDAR (see **FOR FURTHER INFORMATION CONTACT**) to request an invitation providing webinar access information. Please request webinar invitations at least 24 hours in advance of each webinar.

SEDAR address: 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Julie A. Neer, SEDAR Coordinator; (843) 571–4366; email: *Julie.neer@safmc.net.*

SUPPLEMENTARY INFORMATION: The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a multi-step process including: (1) Data/Assessment Workshop, and (2) a series of webinars. The product of the Data/Assessment Workshop is a report which compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses, and describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, HMS Management Division, and Southeast Fisheries Science Center. Participants include data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and NGO's; International experts; and staff of Councils, Commissions, and state and federal agencies.

The items of discussion in the SEDAR 49 post-workshop webinar are as follows:

1. Panelists will review the recommendations from the Data Workshop, and finalize any data issues still outstanding.
2. Participants will recommend the most appropriate data sets for use in the assessment modeling.

Although non-emergency issues not contained in this agenda may come

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[10] *See Multilayered Wood Flooring from the People's Republic of China: Final Results and Partial Rescission of Countervailing Duty Administrative Review: 2012* (80 FR 41007, July 14, 2015) and accompanying Issues and Decision Memorandum at 23–24. We have omitted Anhui Suzhou Dongda Wood Co., Ltd. and Yixing Lion-King Timber Industry from the notice because we have now included the correct spelling of these companies. Dongtai Fuan Universal Dynamics LLC and Zhejiang Longsen Lumbering Co., Ltd. were listed twice in the Initiation Notice.

before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (see **ADDRESSES**) at least 10 business days prior to each workshop.

Note: The times and sequence specified in this agenda are subject to change.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: May 18, 2016.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2016–12061 Filed 5–20–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE638

New England Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Scallop Advisory Panel to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This meeting will be held on Tuesday, June 7, 2016 at 9:30 a.m.

ADDRESSES:

Meeting address: The meeting will be held at the Hilton Garden Inn Boston Logan Airport, 100 Boardman Street, Boston, MA 02128; telephone: (617) 571–5478; fax: (617) 561–0798.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Agenda

The Advisory Panel will review the general workload for 2016 based on Council priorities and a draft action plan for Scallop Framework 28 (FW28) and potentially identify recommendations for prioritizing work items in upcoming actions. The Advisory Panel will also review progress on potential management measures that may be included in FW28, including: (1) Measures to restrict the possession of shell stock inshore of 42°20′ N.; (2) Modifications to the process for setting scallop fishery annual catch limits (ACL flowchart); (3) Measures to modify scallop access areas consistent with potential changes to habitat and groundfish mortality closed areas; and (4) Development of gear modifications to further protect small scallops. The Advisory Panel will provide research recommendations for the 2017/18 Scallop Research Set-Aside (RSA) federal funding announcement and potentially discuss other RSA policies and program details. The Advisory Panel will give a brief update on the required five-year review of the limited access general category IFQ program. Other business may be discussed.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: May 18, 2016.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2016–12059 Filed 5–20–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE610

North Pacific Fishery Management Council; Public Meetings

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public meetings.

SUMMARY: The North Pacific Fishery Management Council (Council) and its advisory committees will meet June 6 through June 14, 2016.

DATES: The Council will begin its plenary session at 8 a.m. in the Pavilion Room, Kodiak Convention Center on Wednesday, June 8, continuing through Tuesday, June 14, 2016. The Scientific and Statistical Committee (SSC) will begin at 8 a.m. in the Harbor Room, Kodiak Best Western on Monday, June 6 and continue through Wednesday, June 8, 2016. The Council's Advisory Panel (AP) will begin at 8 a.m. at the Elks Lodge on Tuesday, June 7, and continue through Saturday, June 11, 2016. The Enforcement Committee will meet in the Stellar Room, Kodiak Convention Center (time and date to be determined). The Legislative Committee will meet in the Pavilion Room (time and date to be determined).

ADDRESSES: The Council meeting will be held at the Kodiak Harbor Convention Center, 236 Rezanof Drive, Kodiak, AK 99615. The SSC will meet at the Kodiak Best Western, 236 Rezanof Drive, Kodiak, AK 99615. The AP will meet at the Elks Lodge, 102 W. Marine Way, Kodiak, AK 99615.

Council address: North Pacific Fishery Management Council, 605 W. 4th Ave., Suite 306, Anchorage, AK 99501–2252; telephone: (907) 271–2809.

FOR FURTHER INFORMATION CONTACT: David Witherell, Council staff; telephone: (907) 271–2809.

SUPPLEMENTARY INFORMATION:

Agenda

Monday, June 6, 2016 Through Tuesday, June 14, 2016

Council Plenary Session: The agenda for the Council's plenary session will include the following issues. The Council may take appropriate action on any of the issues identified.

(1) Executive Director's Report
(2) NMFS Management Report (including update on recusal determination)

(3) NOAA Enforcement Report
(4) ADF&G Report
(5) USCG Report
(6) USFWS Report
(7) Protected Species Report
(8) NPRB Report
(9) Observer Program (a) Annual Report (b) Estimation Methods for Variance—(SSC only), and (c) Observer Advisory Committee (OAC) Report
(10) Bering Sea Aleutian Island (BSAI) Crab Plan Team Report
(11) BSAI 10-Year-Review
(12) Tanner Crab Custom Processing Cap
(13) Gulf of Alaska (GOA) Trawl Bycatch Management
(14) Squid to Ecosystem Component Category
(15) Determine Research Priorities
(16) Electronic Monitoring (EM)—Review Analytical Components (SSC Only)
(17) Pacific Cod Stock Assessment Models (SSC Only)
(18) Staff Tasking

The Advisory Panel will address most of the same agenda issues as the Council except B reports.

The SSC agenda will include the following issues:

(1) Observer Program—Estimation Methods for Variance
(2) Electronic Monitoring (EM)—Review Analytical Components
(3) Pacific Cod Stock Assessment Models
(4) BSAI Crab Plan Team Report
(5) BSAI Crab 10-Year-Review
(6) Tanner Crab Custom Processing Cap
(7) Squid to Ecosystem Component Category
(8) Research Priorities

In addition to providing ongoing scientific advice for fishery management decisions, the SSC functions as the Councils primary peer review panel for scientific information as described by the Magnuson-Stevens Act section 302(g)(1)(e), and the National Standard 2 guidelines (78 FR 43066). The peer review process is also deemed to satisfy the requirements of the Information Quality Act, including the OMB Peer Review Bulletin guidelines.

The Agenda is subject to change, and the latest version will be posted at *http://www.npfmc.org/*.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Shannon Gleason at (907) 271–2809 at least 7 working days prior to the meeting date.

Dated: May 18, 2016.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2016–12041 Filed 5–20–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE636

Gulf of Mexico Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of a public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council will hold a meeting of its Data Collection Technical Committee.

DATES: The meeting will convene Monday, June 6, 2016, from 8:30 a.m.–5 p.m.

ADDRESSES: The meeting will take place at the Council's office.

Council address: Gulf of Mexico Fishery Management Council, 2203 N. Lois Avenue, Suite 1100, Tampa, FL 33607; telephone: (813) 348–1630.

FOR FURTHER INFORMATION CONTACT: Dr. John Froeschke, Fishery Biologist-Statistician, Gulf of Mexico Fishery Management Council; *john.froeschke@gulfcouncil.org;* telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION: The items of discussion on the agenda are as follows:

The Data Collection Technical Committee will meet to discuss options to implement electronic reporting of fisheries data in the Gulf of Mexico for-hire sector and provide recommendations to the Gulf Council at the June 2016 Council meeting. The objectives are to improve timeliness and data quality of fisheries data from the federal for-hire sector that will be used to support fisheries science and management. The Committee will receive an overview of the electronic reporting program for federally permitted headboats and a presentation describing decision points (*e.g.*, technology used, reporting frequency and data to be collected) in a potential program for federally permitted Gulf of Mexico for-hire vessels. The committee is expected to discuss and provide feedback on the decision points raised in the presentations and provide recommendations based upon the strengths, limitations, and value of the various electronic reporting program options under consideration.

Meeting Adjourns

The Agenda is subject to change, and the latest version along with other meeting materials will be posted on the Council's file server. To access the file server, the URL is *https://public.gulfcouncil.org:5001/webman/index.cgi*, or go to the Council's Web site and click on the File Server link in the lower left of the Council Web site (*http://www.gulfcouncil.org*). The username and password are both "gulfguest". Click on the "Library Folder", then scroll down to "Data Collection Technical Committee".

The meeting will be webcast over the internet. A link to the webcast will be available on the Council's Web site, *http://www.gulfcouncil.org*.

Although other non-emergency issues not on the agenda may come before the Technical Committee for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, those issues may not be the subject of formal action during this meeting. Actions of the Technical Committee will be restricted to those issues specifically identified in the agenda and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kathy Pereira at the Gulf Council Office (see **ADDRESSES**), at least 5 working days prior to the meeting.

Dated: May 18, 2016.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2016–12040 Filed 5–20–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE639

New England Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Groundfish Committee to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This meeting will be held on Thursday, June 9, 2016 at 9 a.m.

ADDRESSES: The meeting will be held at the Hilton Garden Inn, 100 Boardman Street, Boston, MA 02128; phone: (617) 567–6789; fax: (617) 461–0798.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Agenda

The committee will receive an update from the Plan Development Team (PDT) on Committee tasking regarding estimated discards and associated CVs and a draft white paper examining the groundfish monitoring program; and make recommendations to the Council. They will also review PDT work to date on developing a sub-ACL for the scallop fishery for northern windowpane flounder and allocating the northern windowpane flounder stock to sectors in the groundfish fishery; and make recommendations to the Council regarding the development of alternatives. The committee will also review PDT work to date on this action that considers revising the Georges Bank haddock sub-ACL and associated accountability measures; and make recommendations to the Council regarding the development of alternatives. Other business will be discussed as necessary.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: May 18, 2016.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2016–12060 Filed 5–20–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE637

Fisheries of the South Atlantic; Southeast Data, Assessment, and Review (SEDAR); Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of SEDAR Data Best Practices Standing Panel Webinar.

SUMMARY: The SEDAR Data Best Practices Panel will develop, review, and evaluate best practice recommendations for SEDAR Data Workshops. See **SUPPLEMENTARY INFORMATION.**

DATES: The SEDAR Data Best Practices Standing Panel webinar will be held on Monday, June 6, 2016, from 10 a.m. to 12 p.m. (EST).

ADDRESSES:

Meeting address: The meeting will be held via webinar. The webinar is open to members of the public. Those interested in participating should contact Julia Byrd at SEDAR (see **FOR FURTHER INFORMATION CONTACT**) to request an invitation providing webinar access information. Please request webinar invitations at least 24 hours in advance of each webinar.

SEDAR address: South Atlantic Fishery Management Council (SAFMC), 4055 Faber Place Drive, Suite 201, N. Charleston, SC 29405; *www.sedarweb.org.*

FOR FURTHER INFORMATION CONTACT: Julia Byrd, SEDAR Coordinator, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; phone: (843) 571–4366; email: *julia.byrd@safmc.net.*

SUPPLEMENTARY INFORMATION: The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions, have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a three-step process including: (1) Data Workshop; (2) Assessment Process utilizing webinars; and (3) Review Workshop. The product of the Data Workshop is a data report which compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The product of the Assessment Process is a stock assessment report which describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Summary documenting panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, Highly Migratory Species Management Division, and Southeast Fisheries Science Center. Participants include: Data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and non-governmental organizations (NGOs); international experts; and staff of Councils, Commissions, and state and federal agencies.

The SEDAR Data Best Practices Standing Panel is charged with developing, reviewing, and evaluating best practice recommendations for SEDAR Data Workshops. This will be the second meeting of this group. The items of discussion for this webinar are as follows:

1. Finalize terms of reference, incorporating SEDAR Steering Committee feedback as necessary, that specify the Panel's purpose and approach.
2. Begin discussions on SEDAR Data Best Practices living document.
3. Other business.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

This meeting is accessible to people with disabilities. Requests for auxiliary aids should be directed to the SAFMC office (see **ADDRESSES**) at least 10 business days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: May 18, 2016.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2016–12037 Filed 5–20–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

Patent Processing (Updating)

ACTION: Proposed collection; comment request.

SUMMARY: The United States Patent and Trademark Office (USPTO), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on this extension of a continuing information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before July 22, 2016.

ADDRESSES: You may submit comments by any of the following methods:

- *Email: InformationCollection@uspto.gov.* Include "0651–0031 inquiry" in the subject line of the message.
- *Federal Rulemaking Portal: http://www.regulations.gov.*
- *Mail:* Marcie Lovett, Records Management Division Director, Office of the Chief Information Officer, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Raul Tamayo, Senior Legal Advisor, Office of Patent Legal Administration, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450; by telephone at 571–272–7728; or by email to *Raul.Tamayo@uspto.gov* with "0651–0031 inquiry" in the subject line. Additional information about this collection is also available at *http://www.reginfo.gov* under "Information Collection Review."

SUPPLEMENTARY INFORMATION:

I. Abstract

The United States Patent and Trademark Office (USPTO) is required by 35 U.S.C. 131 to examine an application for patent and, when appropriate, issue a patent. The USPTO is also required to publish patent applications, with certain exceptions, promptly after the expiration of a period of eighteen months from the earliest filing date for which a benefit is sought under Title 35, United States Code ("eighteen-month publication"). Certain situations may arise which require that additional information be supplied in order for the USPTO to further process the patent or application. The USPTO administers the statutes through various sections of the rules of practice in 37 CFR part 1.

The information in this collection can be used by the USPTO to continue the processing of the patent or application to ensure that applicants are complying with the patent regulations and to aid in the prosecution of the application.

II. Method of Collection

The forms associated with this collection may be downloaded from the USPTO Web site in Portable Document Format (PDF), filled out electronically, and then either printed for mailing or submitted to the USPTO online through EFS-Web. The "EFS-Web only" items in this collection must be submitted to the USPTO online through EFS-Web. In addition, the USPTO provides an electronic interface on its Web site that the public can use to submit the information associated with the Electronic Applicant Initiated Interview Request Form.

III. Data

OMB Number: 0651–0031.

IC Instruments and Forms: PTO/AIA/22, PTO/AIA/24, PTO/AIA/24B, PTO/AIA/31, PTO/AIA/32, PTO/AIA/33, PTO/AIA/40, PTO/AIA/41, PTO/AIA/96, PTO/SB/08a, PTO/SB/08b, PTO/SB/17i, PTO/SB/21, PTO/SB/22, PTO/SB/24, PTO/SB/24B, PTO/SB/25, PTO/SB/26, PTO/SB/27, PTO/SB/30, PTO/SB/31, PTO/SB/32, PTO/SB/33, PTO/SB/35, PTO/SB/36, PTO/SB/37, PTO/SB/38, PTO/SB/39, PTO/SB/43, PTO/SB/61, PTO/SB/63, PTO/SB/64, PTO/SB/64a, PTO/SB/67, PTO/SB/68, PTO/SB/91, PTO/SB/92, PTO/SB/96, PTO/SB/97, PTO/SB/130, PTO–2053–A/B, PTO–2054–A/B, PTO–2055–A/B, PTOL–413A, and PTOL–413C.

Type of Review: Revision of a Previously-Existing Information Collection.

Affected Public: Individuals or households; businesses or other for-profits; and non-profit institutions.

Estimated Number of Respondents: 3,542,082 responses per year.

Estimated Time per Response: The USPTO estimates that it will take the public between 2 minutes (.03 hours) and 8 hours to submit a single item in this collection depending on the instrument used, including the time to gather the necessary information, prepare the appropriate form or petition, and submit the completed request to the USPTO. The time per response, estimated annual responses, and estimated annual hour burden associated with each instrument in this collection are shown in the table below.

Estimated Total Annual Respondent Burden Hours: 3,631,187.33 hours.

Estimated Total Annual Respondent (Hourly) Cost Burden: $952,818,894.17. The USPTO expects that attorneys and/or paralegals will complete the instruments listed in the table below. The professional hourly rates for attorneys and paralegals, based on AIPLA's 2015 *Report of the Economic Survey,* are $410 and $125 respectively. Using these hourly rates, the USPTO estimates that the total respondent cost burden for this collection is $952,818,894.17 per year.

IC No.	Item	Estimated response time (minutes)	Estimated annual responses	Estimated annual burden (hours)	Rate ($/hr)
		(a)	(b)	(a) × (b)/60 = (c)	(d)
1	EFS-Web IDS (Information Disclosure Statements) that do not require the fee set forth in 37 CFR 1.17(p).	120	635,000	1,270,000.00	410.00

IC No.	Item	Estimated response time (minutes) (a)	Estimated annual responses (b)	Estimated annual burden (hours) (a) × (b)/60 = (c)	Rate ($/hr) (d)
1	Information Disclosure Statements that do not require the fee set forth in 37 CFR 1.17(p).	120	20,000	40,000.00	410.00
1	EFS-Web IDS (Information Disclosure Statements) that require the fee set forth in 37 CFR 1.17(p).	120	115,000	230,000.00	410.00
1	Information Disclosure Statements that require the fee set forth in 37 CFR 1.17(p).	120	5,000	10,000.00	410.00
2	Electronic Transmittal Form	120	850,000	1,700,000.00	125.00
2	Transmittal Form	120	50,000	100,000.00	125.00
3	Electronic Petition for Extension of Time under 37 CFR 1.136(a).	6	290,000	29,000.00	125.00
3	Petition for Extension of Time under 37 CFR 1.136(a)	6	10,000	1,000.00	125.00
4	Electronic Express Abandonment under 37 CFR 1.138	12	4,800	960.00	125.00
4	Express Abandonment under 37 CFR 1.138	12	200	40.00	125.00
5	Electronic Statutory Disclaimers (including terminal disclaimers).	12	58,000	11,600.00	410.00
5	Statutory Disclaimers (including terminal disclaimers)	12	2,000	400.00	410.00
6	Electronic Request for Expedited Examination of a Design Application.	6	390	39.00	410.00
6	Request for Expedited Examination of a Design Application.	6	10	1.00	410.00
7	Electronic Notice of Appeal	12	28,000	5,600.00	410.00
7	Notice of Appeal	12	1,000	200.00	410.00
8	Electronic Petition for Revival of an Application for Patent Abandoned Unintentionally.	60	7,500	7,500.00	410.00
8	Petition for Revival of an Application for Patent Abandoned Unintentionally.	60	500	500.00	410.00
9	Electronic Petition for Revival of an Application for Patent Abandoned for Failure to Notify the Office of a Foreign or International Filing.	60	190	190.00	410.00
9	Petition for Revival of an Application for Patent Abandoned for Failure to Notify the Office of a Foreign or International Filing.	60	10	10.00	$410.00
10	Electronic Requests to Access, Inspect and Copy	12	95,000	19,000.00	125.00
10	Requests to Access, Inspect and Copy	12	5,000	1,000.00	125.00
11	Electronic Deposit Account Order Form	12	1,600	320.00	125.00
11	Deposit Account Order Form	12	100	20.00	125.00
12	Electronic Certificates of Mailing or Transmission	2	750,000	25,000.00	125.00
12	Certificates of Mailing or Transmission	2	50,000	1,666.66	125.00
13	Electronic Statement Under 37 CFR 3.73(c)	12	240,000	48,000.00	410.00
13	Statement Under 37 CFR 3.73(c)	12	10,000	2,000.00	410.00
14	Electronic Non-publication Request	6	23,000	2,300.00	410.00
14	Non-publication Request	6	1,000	100.00	410.00
15	Electronic Rescission of Previous Non-publication Request (35 U.S.C. 122(b)(2)(B)(ii) and, if applicable, Notice of Foreign Filing (35 U.S.C. 122(b)(2)(B)(iii).	6	900	90.00	410.00
15	Rescission of Previous Non-publication Request (35 U.S.C. 122(b)(2)(B)(ii) and, if applicable, Notice of Foreign Filing (35 U.S.C. 122(b)(2)(B)(iii).	6	50	5.00	410.00
16	Electronic Filing System (EFS) Copy of Application for Publication.	150	1	2.50	125.00
17	Copy of File Content Showing Redactions	240	1	4.00	410.00
18	Copy of the Applicant or Patentee's Record of the Application (including copies of the correspondence, list of the correspondence, and statements verifying whether the record is complete or not).	120	10	20.00	125.00
19	EFS-Web Request for Continued Examination (RCE) Transmittal.	12	165,000	33,000.00	410.00
19	Request for Continued Examination (RCE) Transmittal	12	5,000	1,000.00	410.00
20	Electronic Request for Oral Hearing Before the Patent Trial and Appeal Board.	12	950	190.00	410.00
20	Request for Oral Hearing Before the Patent Trial and Appeal Board.	12	50	10.00	410.00
21	Electronic Request for Suspension of Action or Deferral of Examination Under 37 CFR 1.103(b), (c), or (d).	12	700	140.00	410.00
21	Request for Suspension of Action or Deferral of Examination Under 37 CFR 1.103(b), (c), or (d).	12	50	10.00	410.00
22	EFS-Web Request for Voluntary Publication or Republication (includes publication fee for republication).	12	290	58.00	125.00

IC No.	Item	Estimated response time (minutes)	Estimated annual responses	Estimated annual burden (hours)	Rate ($/hr)
		(a)	(b)	(a) × (b)/60 = (c)	(d)
22	Request for Voluntary Publication or Republication (includes publication fee for republication).	12	10	2.00	125.00
23	Electronic Applicant Initiated Interview Request Form	24	11,000	4,400.00	410.00
23	Applicant Initiated Interview Request Form	24	3,500	1,400.00	410.00
24	Electronic Processing Fee Under 37 CFR 1.17(i) Transmittal.	5	340	28.33	410.00
24	Processing Fee Under 37 CFR 1.17(i) Transmittal	5	10	0.83	410.00
25	Electronic Request to Retrieve Electronic Priority Application(s) Under 37 CFR 1.55(h).	8	11,500	1,533.33	410.00
25	Request to Retrieve Electronic Priority Application (s) Under 37 CFR 1.55(h).	8	500	66.67	410.00
26	Electronic Authorization or Rescission of Authorization to Permit Access to Application-as-filed by Participating Offices Under 37 CFR 1.14(h).	6	14,500	1,450.00	410.00
26	Authorization or Rescission of Authorization to Permit Access to Application-as-filed by Participating Offices Under 37 CFR 1.14(h).	6	500	50.00	410.00
27	Electronic Petition for Express Abandonment to Obtain a Refund.	12	1,550	310.00	410.00
27	Petition for Express Abandonment to Obtain a Refund	12	50	10.00	410.00
28	Electronic Pre-Appeal Brief Request for Review	300	10,500	52,500.00	410.00
28	Pre-Appeal Brief Request for Review	300	500	2,500.00	410.00
29	EFS-Web Request for Corrected Filing Receipt	5	29,000	2,416.67	125.00
29	Request for Corrected Filing Receipt	5	1,000	83.33	125.00
30	Request for First Action Interview (Pilot Program) (Electronic only).	150	1,200	3,000.00	410.00
31	Petition to Make Special Based on Age for Advancement of Examination under 37 CFR 1.102(c)(1) (EFS-Web only).	120	2,000	4,000.00	410.00
32	Electronic Filing a submission after final rejection (see 37 CFR 1.129(a)).	480	110	880.00	410.00
32	Filing a submission after final rejection (see 37 CFR 1.129(a)).	480	10	80.00	410.00
33	Electronic correction of inventorship after first office action on the merits.	45	2,900	2,175.00	410.00
33	Correction of inventorship after first office action on the merits.	45	100	75.00	410.00
34	Electronic request for correction in a patent application relating to inventorship or an inventor name, or order of names, other than in a reissue application (37 CFR 1.48).	45	14,500	10,875.00	410.00
34	Request for correction in a patent application relating to inventorship or an inventor name, or order of names, other than in a reissue application (37 CFR 1.48).	45	500	375.00	410.00
35	Electronic request to correct or update the name of the applicant under 37 CFR 1.46(c)(1), or change the applicant under 37 CFR 1.46(c)(2).	12	9,500	1,900.00	410.00
35	Request to correct or update the name of the applicant under 37 CFR 1.46(c)(1), or change the applicant under 37 CFR 1.46(c)(2).	12	500	100.00	410.00
Total			3,542,082	3,631,187.33	

Estimated Total Annual (Non-hour) Respondent Cost Burden: $420,815,258.45. There are no recordkeeping, maintenance, or capital start-up costs associated with this information collection. There is, however, a non-hour cost burden in the form of postage costs and filing fees.

Postage

The public may submit the paper forms and petitions in this collection to the USPTO by mail through the United States Postal Service. If the submission is sent by first-class mail, the public may also include a signed certification of the date of mailing in order to receive credit for timely filing. Therefore, the USPTO estimates that approximately 167,161 submissions per year may be mailed. The USPTO estimates that the average submission will be mailed in a standard flat-rate priority mail envelope at a cost of $6.45, resulting in a total postage cost of $1,078,188.45.

Filing Fees

IC No.	Item	Estimated annual responses (a)	Filing fee per response* (b)	Total annual (non-hour) cost burden (a) × (b) = (c)
1	Information Disclosure Statements (IDS) that require the fee set forth in 37 CFR 1.17(p).	90,000	$180.00	$16,200,000.00
1	IDS that require the fee set forth in 37 CFR 1.17(p) (small entity)	S: 27,500 M: 2,500	S: $90.00 M: $45.00	S: $2,475,000.00 M: $112,500.00
3	One-month Extension of Time under 37 CFR 1.136(a)	102,500	$200.00	$20,500,000.00
3	One-month Extension of Time under 37 CFR 1.136(a) (small entity)	S: 38,000 M: 4,000	S: $100.00 M: $50.00	S: $3,800,000.00 M: $200,000.00
3	Two-month Extension of Time under 37 CFR 1.136(a)	43,600	$600.00	$26,160,000.00
3	Two-month Extension of Time under 37 CFR 1.136(a) (small entity)	S: 22,000 M: 2,100	S: $300.00 M: $150.00	S: $6,600,000.00 M: $315,000.00
3	Three-month Extension of Time under 37 CFR 1.136(a)	40,000	$1,400.00	$56,000,000.00
3	Three-month Extension of Time under 37 CFR 1.136(a) (small entity)	S: 32,000 M: 3,000	S: $700.00 M: $350.00	S: $22,400,000.00 M: $1,050,000.00
3	Four-month Extension of Time under 37 CFR 1.136(a)	2,500	$2,200.00	$5,500,000.00
3	Four-month Extension of Time under 37 CFR 1.136(a) (small entity)	S: 2,500 M: 350	S: $1,100.00 M: $550.00	S: $2,750,000.00 M: $192,500.00
3	Five-month Extension of Time under 37 CFR 1.136(a)	3,500	$3,000.00	$10,500,000.00
3	Five-month Extension of Time under 37 CFR 1.136(a) (small entity)	S: 3,700 M: 250	S: $1,000.00 M: $500.00	S: $3,700,000.00 M: $125,000.00
5	Statutory Disclaimer (including terminal disclaimer)	60,000	$160.00	$9,600,000.00
5	Statutory Disclaimer (including terminal disclaimer) (small entity)	6,289	$160.00	$1,006,240.00
6	Request for Expedited Examination of a Design Application	200	$900.00	$180,000.00
6	Request for Expedited Examination of a Design Application (small entity).	S: 160 M: 40	S: $450.00 M: $225.00	S: $72,000.00 M: $9,000.00
7	Notice of Appeal	22,500	$800.00	$18,000,000.00
7	Notice of Appeal (small entity)	S: 6,000 M: 500	S: $400.00 M: $200.00	S: $2,400,000.00 M: $100,000.00
8	Petition for Revival of an Application for Patent Abandoned Unintentionally.	3,500	$1,700.00	$5,950,000.00
8	Petition for Revival of an Application for Patent Abandoned Unintentionally (small entity).	4,500	$850.00	$3,825,000.00
9	Petition for revival of an application for patent abandoned for failure to notify the office of a foreign or international filing.	150	$1,700.00	$255,000.00
9	Petition for revival of an application for patent abandoned for failure to notify the office of a foreign or international filing (small entity).	50	$850.00	$42,500.00
17	Copy of File Content Showing Redactions	1	$130.00	$130.00
19	Request for Continued Examination (RCE) Transmittal (First Request)	78,400	$1,200.00	$94,080,000.00
19	Request for Continued Examination (RCE) Transmittal (First Request) (small entity).	S: 28,000 M: 5,600	S: $600.00 M: $300.00	S: $16,800,000.00 M: $1,680,000.00
19	Request for Continued Examination (RCE) Transmittal (Second and Subsequent Requests).	40,600	$1,700.00	$69,020,000.00
19	Request for Continued Examination (RCE) Transmittal (Second and Subsequent Requests) (small entity).	S: 14,500 M: 2,900	S: $850.00 M: $425.00	S: $12,325,000.00 M: $1,232,500.00
20	Request for Oral Hearing Before the Patent Trial and Appeal Board	700	$1,300	$910,000.00
20	Request for Oral Hearing Before the Patent Trial and Appeal Board (small entity).	S: 240 M: 10	S: $650.00 M: $325.00	S: $156,000.00 M: $3,250.00
21	Request for Suspension of Action or Deferral of Examination Under 37 CFR 1.103(b), (c), or (d).	520	$140.00	$72,800.00
21	Request for Suspension of Action or Deferral of Examination Under 37 CFR 1.103(b), (c), or (d) (small entity).	S: 190 M: 40	S: $70.00 M: $35.00	S: $13,300.00 M: $1,400.00
22	Request for Voluntary Publication or Republication (includes publication fee for republication).	300	$130.00	$39,000.00
24	Processing Fee Under 37 CFR 1.17(i) Transmittal	340	$130.00	$44,200.00
32	Filing a submission after final rejection (see 37 CFR 1.129(a))	60	$840.00	$50,400.00
32	Filing a submission after final rejection (see 37 CFR 1.129(a)) (small entity).	S: 50 M: 10	S: $420.00 M: $210.00	S: $21,000.00 M: $2,100.00
33	Correction of inventorship after first office action on the merits	2,100	$600.00	$1,260,000.00
33	Correction of inventorship after first office action on the merits (small entity).	S: 750 M: 150	S: $300.00 M: $150.00	S: $225,000.00 M: $22,500.00
34	Request for correction in a patent application relating to inventorship or an inventor name, or order of names, other than in a reissue application (37 CFR 1.48).	10,500	$140.00	$1,470,000.00
34	Request for correction in a patent application relating to inventorship or an inventor name, or order of names, other than in a reissue application (37 CFR 1.48).	S: 3,750 M: 750	S: $70.00 M: $35.00	S: $262,500.00 M: $26,250.00
Total		740,425		$419,737,070.00

* "S" and "M" denote "Small Entity" and "Micro Entity" and reference the lower fee rates offered to small entities.

Therefore, the USPTO estimates that the total annual (non-hour) cost burden for this collection will be $420,815,258.45, with $1,078,188.45 in postage costs and $419,737,070.00 in filing fees.

IV. Request for Comments

Comments are invited on:

(a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility;

(b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information;

(c) ways to enhance the quality, utility, and clarity of the information to be collected; and

(d) ways to minimize the burden of the collection of information on respondents, *e.g.,* the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: May 16, 2016.

Marcie Lovett,

Records Management Division Director, OCIO, United States Patent and Trademark Office.

[FR Doc. 2016–12042 Filed 5–20–16; 8:45 am]

BILLING CODE 3510–16–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

[Docket No. CFPB–2016–0024]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice and request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the Bureau of Consumer Financial Protection (Bureau) is requesting to renew the Office of Management and Budget (OMB) approval for an existing information collection titled, "Policy to Encourage Trial Disclosure Programs; Information Collection."

DATES: Written comments are encouraged and must be received on or before June 22, 2016 to be assured of consideration.

ADDRESSES: You may submit comments, identified by the title of the information collection, OMB Control Number (see below), and docket number (see above), by any of the following methods:

- *Electronic: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *OMB:* Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503 or fax to (202) 395–5806. Mailed or faxed comments to OMB should be to the attention of the OMB Desk Officer for the Bureau of Consumer Financial Protection.

Please note that comments submitted after the comment period will not be accepted. In general, all comments received will become public records, including any personal information provided. Sensitive personal information, such as account numbers or Social Security numbers, should not be included.

FOR FURTHER INFORMATION CONTACT: Documentation prepared in support of this information collection request is available at *www.reginfo.gov* (this link active on the day following publication of this notice). Select "Information Collection Review," under "Currently under review, use the dropdown menu "Select Agency" and select "Consumer Financial Protection Bureau" (recent submissions to OMB will be at the top of the list). The same documentation is also available at *www.regulations.gov.* Requests for additional information should be directed to the Consumer Financial Protection Bureau, (Attention: PRA Office), 1700 G Street NW., Washington, DC 20552, (202) 435–9575, or email: *CFPB_PRA@cfpb.gov. Please do not submit comments to this email box.*

SUPPLEMENTARY INFORMATION:

Title of Collection: Policy to Encourage Trial Disclosure Programs; Information Collection.

OMB Control Number: 3170–0039.

Type of Review: Extension without change of an existing information collection.

Affected Public: Businesses and other for-profit entities.

Estimated Number of Respondents: 10.

Estimated Total Annual Burden Hours: 100.

Abstract: In subsection 1032(e) of the Dodd-Frank Act, 12 U.S.C. 5532(e), Congress gave the Bureau authority to provide certain legal protections to companies to conduct trial disclosure programs. This authority can be used to help further the Bureau's statutory objective, stated in subsection 1021(b)(5) of the Act, to "facilitate access and innovation" in the "markets for consumer financial products and services." There are two main purposes for the use of these eligibility criteria. First, the specific criteria are intended to help the Bureau identify trial disclosure proposals that hold the potential to demonstrate improvements in disclosure to consumers, while controlling appropriately for risks to consumers. Second, by using standardized criteria across all submitters, the Bureau will be better placed to assess the merits of different proposals relative to each other.

Request for Comments: The Bureau issued a 60-day **Federal Register** notice on March 9, 2016, (80 FR 12479). Comments were solicited and continue to be invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (b) The accuracy of the Bureau's estimate of the burden of the collection of information, including the validity of the methods and the assumptions used; (c) Ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

Dated: May 18, 2016.

Darrin A. King,

Paperwork Reduction Act Officer, Bureau of Consumer Financial Protection.

[FR Doc. 2016–12082 Filed 5–20–16; 8:45 am]

BILLING CODE 4810–AM–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

[Docket No.: CFPB–2016–0023]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice and request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the Bureau of Consumer Financial Protection (Bureau) is requesting to renew the Office of Management and Budget (OMB)

approval for an existing information collection titled, "Equal Access to Justice Act."

DATES: Written comments are encouraged and must be received on or before June 22, 2016 to be assured of consideration.

ADDRESSES: You may submit comments, identified by the title of the information collection, OMB Control Number (see below), and docket number (see above), by any of the following methods:

- *Electronic: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *OMB:* Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503 or fax to (202) 395–5806. Mailed or faxed comments to OMB should be to the attention of the OMB Desk Officer for the Bureau of Consumer Financial Protection.

Please note that comments submitted after the comment period will not be accepted. In general, all comments received will become public records, including any personal information provided. Sensitive personal information, such as account numbers or social security numbers, should not be included.

FOR FURTHER INFORMATION CONTACT: Documentation prepared in support of this information collection request is available at *www.reginfo.gov (this link active on the day following publication of this notice).* Select "Information Collection Review," under "Currently under review, use the dropdown menu "Select Agency" and select "Consumer Financial Protection Bureau" (recent submissions to OMB will be at the top of the list). The same documentation is also available at *www.regulations.gov.* Requests for additional information should be directed to the Consumer Financial Protection Bureau, (Attention: PRA Office), 1700 G Street NW., Washington, DC 20552, (202) 435–9575, or email: *CFPB_PRA@cfpb.gov. Please do not submit comments to this email box.*

SUPPLEMENTARY INFORMATION:

Title of Collection: Equal Access to Justice Act.

OMB Control Number: 3170–0040.

Type of Review: Extension without change of a currently approved collection.

Affected Public: Individuals or households.

Estimated Number of Respondents: 3.

Estimated Total Annual Burden Hours: 15.

Abstract: The Equal Access to Justice Act (the Act) provides for payment of fees and expenses to eligible parties who have prevailed against the Bureau in certain administrative proceedings. In order to obtain an award, the statute and associated regulations (12 CFR part 1071) require the filing of an application that shows that the party is a prevailing party and is eligible to receive an award under the Act. The Bureau regulations implementing the Act require the collection of information related to the application for an award in 12 CFR part 1071, subparts B, C.

Request for Comments: The Bureau issued a 60-day **Federal Register** notice on March 9, 2016, (80 FR 12478). Comments were solicited and continue to be invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (b) The accuracy of the Bureau's estimate of the burden of the collection of information, including the validity of the methods and the assumptions used; (c) Ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

Dated: May 18, 2016.

Darrin A. King,

Paperwork Reduction Act Officer, Bureau of Consumer Financial Protection.

[FR Doc. 2016–12081 Filed 5–20–16; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF DEFENSE

Department of the Air Force

Meeting of the U.S. Air Force Academy Board of Visitors

AGENCY: Department of the Air Force, Department of Defense.

ACTION: Notice; withdrawal.

SUMMARY: The Department of the Air Force is withdrawing the notice, Meeting of the U.S. Air Force Academy Board of Visitors Notice of Meeting that published May 17, 2016 at 81 FR 30521.

DATES: This withdrawal is effective May 23, 2016.

SUPPLEMENTARY INFORMATION: The Department of the Air Force is withdrawing the meeting notice of the U.S. Air Force Academy Board of Visitors that published May 17, 2016 at 81 FR 30521. The Department received notification from the OPR on 18 May 2016 that the location of the meeting was changed by the Congressional office. The Department will publish a new notice with the updated information in the **Federal Register**.

Henry Williams,

Acting Air Force Federal Register Liaison Officer.

[FR Doc. 2016–12145 Filed 5–20–16; 8:45 am]

BILLING CODE 5001–10–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Reserve Forces Policy Board; Notice of Federal Advisory Committee Meeting

AGENCY: Office of the Secretary of Defense, Reserve Forces Policy Board, Department of Defense.

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: The Department of Defense (DoD) is publishing this notice to announce that the following Federal Advisory Committee meeting of the Reserve Forces Policy Board (RFPB) will take place.

DATES: Wednesday, June 8, 2016 from 9:00 a.m. to 4:30 p.m.

ADDRESSES: The address is the Pentagon, Room 3E863, Arlington, VA.

FOR FURTHER INFORMATION CONTACT: Mr. Alex Sabol, Designated Federal Officer, (703) 681–0577 (Voice), (703) 681–0002 (Facsimile), Email: *Alexander.J.Sabol.Civ@Mail.Mil.* Mailing address is Reserve Forces Policy Board, 5113 Leesburg Pike, Suite 601, Falls Church, VA 22041. Web site: *http://rfpb.defense.gov/.* The most up-to-date changes to the meeting agenda can be found on the RFPB's Web site.

SUPPLEMENTARY INFORMATION: This meeting notice is being published under the provisions of the Federal Advisory Committee Act of 1972 (FACA) (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150.

Purpose of the Meeting: The purpose of the meeting is to obtain, review, and evaluate information related to strategies, policies, and practices designed to improve and enhance the capabilities, efficiency, and effectiveness of the Reserve Components.

Agenda: The RFPB will hold a meeting from 9:00 a.m. to 4:30 p.m. The portion of the meeting from 9:00 a.m. to 12:30 p.m. will be closed to the public and will consist of remarks to the RFPB from following invited speakers: The Under Secretary of the Navy will discuss the key challenges and priorities for the Navy in this period of fiscal uncertainty and an increasingly challenging security environment. The Senior Enlisted Advisor to the Joint Chiefs of Staff will address key national security challenges facing our Nation and priorities for adapting the force. The Acting Under Secretary of Defense for Personnel & Readiness (USD P&R), being newly assigned, will discuss his provided guidance for OUSD P&R to include the progress on the OUSD P&R reorganization, its effects on the oversight of Reserve Component policies and programs, his views on key Reserve Component challenges, and will conclude with a discussion on the overall DoD force readiness. The Secretary of the U.S. Army, being newly assigned, will discuss his provided guidance to the Army posture, his views on the Report of the National Commission on the Future of the Army, and his plans to adapt the Total Army to meet future challenges. The portion of the meeting from 12:30 p.m. to 4:30 p.m. will be open to the public and will consist of the following briefings: The Assistant Secretary of Defense for Manpower and Reserve Affairs, being newly assigned, will discuss his guidance on his Office of Manpower and Reserve Affairs, and their oversight of Reserve Component policies and programs and his views on key Reserve Component challenges facing DoD. IDA will brief the updates on findings of their ongoing study on the Reserve Components' effectiveness during Operation Iraqi Freedom. The Chair of the Supporting & Sustaining Reserve Component Personnel Subcommittee will discuss the Department's and Service's personnel system reforms being considered under the Force of the Future initiatives to include the integrated personnel and pay systems for each service, the Blended Retirement recommendation, the Dual Status Reform, and Post-9/11 GI Bill eligibility for title 32 Full Time National Guard Duty, the 20% Military Technician reduction, and the effects of these reforms on the Reserve Components. The Chair of the Ensuring a Ready, Capable, Available and Sustainable Operational Reserve Subcommittee will update the status onto the RFPB's recommendation to SecDef on the Operational Reserve definition, and will also have a discussion with the Principal Deputy Assistant Secretary of Defense for Health Affairs about Reserve medical readiness issues to include how the Department views medical readiness, current systems used to track readiness, as well as initiatives within the Department to improve readiness within the Reserve Components. The Chair of the Enhancing DoD's Role in the Homeland Subcommittee will provide updates on the DoD's support of civil authorities and FEMA requirements, and will have a discussion with the Senior Advisor to the Assistant Secretary of Defense for Homeland Defense and Global on the DoD's policy guidance for Cyber support and services involving the National Guard and State Cyber activities, and the integration of the Reserve Component in DoD's Cyber Mission Force. The RFPB meeting will conclude with a discussion from the Chairman on the status of the RFPB Issues New Administration Transition Book that will be provided for the Department's briefings for the New Administration.

Meeting Accessibility: Pursuant to section 10(a)(1) of the FACA and 41 CFR 102–3.140 through 102–3.165, and subject to the availability of space, the meeting is open to the public from 12:30 p.m. to 4:30 p.m. Seating is on a first-come, first-served basis. All members of the public who wish to attend the public meeting must contact Mr. Alex Sabol, the Designated Federal Officer, not later than 12:00 p.m. on Tuesday, June 7, 2016, as listed in the **FOR FURTHER INFORMATION CONTACT** section to make arrangements for a Pentagon escort, if necessary. Public attendees requiring escort should arrive at the Pentagon Metro Entrance with sufficient time to complete security screening no later than 12:15 p.m. on June 8. To complete the security screening, please be prepared to present two forms of identification. One must be a picture identification card. In accordance with section 10(d) of the FACA, 5 U.S.C. 552b, and 41 CFR 102–3.155, the DoD has determined that the portion of this meeting scheduled to occur from 9:00 a.m. to 12:30 p.m. will be closed to the public. Specifically, the Acting Under Secretary of Defense (Personnel and Readiness), in coordination with the Department of Defense FACA Attorney, has determined in writing that this portion of the meeting will be closed to the public because it is likely to disclose classified matters covered by 5 U.S.C. 552b(c)(1).

Written Statements: Pursuant to 41 CFR 102–3.105(j) and 102–3.140 and section 10(a)(3) of the FACA, interested persons may submit written statements to the RFPB about its approved agenda or at any time on the RFPB's mission. Written statements should be submitted to the RFPB's Designated Federal Officer at the address, email, or facsimile number listed in the **FOR FURTHER INFORMATION CONTACT** section. If statements pertain to a specific topic being discussed at the planned meeting, then these statements must be submitted no later than five (5) business days prior to the meeting in question. Written statements received after this date may not be provided to or considered by the RFPB until its next meeting. The Designated Federal Officer will review all timely submitted written statements and provide copies to all the RFPB members before the meeting that is the subject of this notice. Please note that since the RFPB operates under the provisions of the FACA, all submitted comments and public presentations will be treated as public documents and will be made available for public inspection, including, but not limited to, being posted on the RFPB's Web site.

Dated: May 18, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2016–12050 Filed 5–20–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

National Security Education Board; Notice of Federal Advisory Committee Meeting

AGENCY: The Office of the Under Secretary of Defense for Personnel and Readiness, Defense Language and National Security Education Office (DLNSEO), DoD.

ACTION: Meeting notice.

SUMMARY: The Department of Defense is publishing this notice to announce that the following Federal advisory committee meeting of the National Security Education Board (NSEB) will take place. This meeting is open to the public.

DATES: Monday, June 6, 2016, from 10:30 a.m. to 4:45 p.m.

ADDRESSES: Liaison Capitol Hill Hotel, 415 New Jersey Avenue NW., Washington, DC 20001.

FOR FURTHER INFORMATION CONTACT: Alison Patz, telephone (571) 256–0771, *Alison.m.patz.civ@mail.mil,* fax (703) 692–2615.

SUPPLEMENTARY INFORMATION: This meeting is being held under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150.

Purpose of the Meeting: The purpose of the meeting is to review and make recommendations to the Secretary of Defense concerning requirements established by the David L. Boren National Security Education Act, title VII of Public Law 102–183, as amended.

Agenda

10:30 a.m.—Opening Remarks and Key Updates.
10:45 a.m.—Board's Role in the National Language Service Corps.
11:15 a.m.—Technology Innovation Collaboration.
12:15 p.m.—Working Lunch.
1:15 p.m.—Updates on the Class of 2016 Boren Scholars and Fellows.
1:45 p.m.—NSEP Exclusive Internship Efforts: Insights from Federal Partners.
2:45 p.m.—Break.
3:00 p.m.—Updates on Outreach Initiatives.
3:30 p.m.—NSEP Recruitment Initiatives: Diversity, Veterans Transition, and K–12 Engagement.
4:15 p.m.—Board Discussion.
4:45 p.m.—Adjourn.

Public's Accessibility to the Meeting: Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165, and the availability of space, this meeting is open to the public. Seating is on a first-come basis.

Committee's Point of Contact: Alison Patz, Alternate Designated Federal Official, (571) 256–0771, *Alison.m.patz.civ@mail.mil.*

Pursuant to 41 CFR 102–3.140 and section 10(a)(3) of the Federal Advisory Committee Act of 1972, the public or interested organizations may submit written statements to the Department of Defense National Security Education Board about its mission and functions. Written statements may be submitted at any time or in response to the stated agenda of the planned meeting.

All written statements shall be submitted to the Designated Federal Official for the National Security Education Board, and this individual will ensure that the written statements are provided to the membership for their consideration. Contact information for the Designated Federal Official can be obtained from the GSA's FACA Database—*http://facadatabase.gov/.*

Statements being submitted in response to the agenda mentioned in this notice must be received by the Designated Federal Official at the address listed in **FOR FURTHER INFORMATION CONTACT** at least five calendar days prior to the meeting that is the subject of this notice. Written statements received after this date may not be provided to or considered by the National Security Education Board until its next meeting.

The Designated Federal Official will review all timely submissions with the National Security Education Board and ensure they are provided to all members of the National Security Education Board before the meeting that is the subject of this notice.

Dated: May 18, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2016–12078 Filed 5–20–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2012–HA–0116]

Proposed Collection; Comment Request

AGENCY: Office of the Assistant Secretary of Defense for Health Affairs, DoD.

ACTION: Notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Office of the Assistant Secretary of Defense for Health Affairs announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by July 22, 2016.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Department of Defense, Office of the Deputy Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

Any associated form(s) for this collection may be located within this same electronic docket and downloaded for review/testing. Follow the instructions at *http://www.regulations.gov* for submitting comments. Please submit comments on any given form identified by docket number, form number, and title.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the SNPMIS Project Officer (Mr. Jack Smith, Solution Delivery Division (SDD) Clinical Systems Division) at 5109 Leesburg Pike, Sky 6, Suite 817, Falls Church, VA 22042–2902 or call 703–681–7156.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and Omb Number: Special Needs Program Management Information System (SNPMIS); OMB Control Number; 0720–XXXX.

Needs and Uses: Special Needs Program Management Information System (SNPMIS) provides access to a comprehensive program of therapy, medical support, and social services for young Department of Defense (DoD) Military Health System (MHS) beneficiaries with special needs. SNPMIS is the Military Health System (MHS) automated information system designed to ensure the DoD meets the unique information requirements associated with implementation of the Individuals with Disabilities Education Act (IDEA). SNPMIS captures records referral, evaluation, eligibility, and service plan data for children with special needs who are eligible for MHS services under IDEA. Management reports provide historical analysis to monitor ongoing improvements in quality of care initiatives. It also allows program managers to identify areas where additional services are needed. At the service level, activities of different programs can be compared to determine best practices that can be implemented throughout the

Educational and Developmental Intervention Services (EDIS) clinics. The system's remote function allows EDIS staff members to enter a young beneficiary's data while conducting activities from that child's school or home.

Affected Public: Individuals and Households.

Annual Burden Hours: 13,913.

Number of Respondents: 4,174.

Responses per Respondent: 2.

Annual Responses: 8,348.

Average Burden per Response: 100 minutes.

Frequency: On occasion.

Information is collected from the individual to whom the record pertains, reports from physicians and other medical department personnel, reports and information from other sources including educational institutions, medical institutions, public and private health, and welfare agencies. Information from the family may be collected during an intake meeting, a meeting to develop a service plan, as a result of provision of services, performance of an evaluation, or other coordination activities. The EDIS clinic or Department of Defense Dependents School (DoDDS) school must obtain permission from the family before information is collected from or provided to an external agency, and prior to conducting evaluations or providing services. Before information is released to an external agency the parents must sign a Health Insurance Portability and Accountability Act (HIPAA) release.

Personally identifiable information (PII) and protected health information (PHI) that is collected by the system includes: Name, Social Security Number (SSN), Family member prefix (FMP), Birth Date, Race/Ethnicity, Gender, Marital Status, Spouse Information, Child Information, Disability Information, Home, Personal Cell, and Work Phone Numbers—Child and Parents, Emergency Contact, Education Information: Child's School Address; Individual educational program plans, Sponsor Name, Sponsor SSN Sponsor and Spouse rank or title, Sponsor's unit, Other child care locations, Provider's name and title that evaluate and provide intervention, Medical Information: Clinics and medical summaries, EDIS process and activities data including referral, evaluation, eligibility, and service plans.

Dated: May 18, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2016–12035 Filed 5–20–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Navy

Meeting of the U.S. Naval Academy Board of Visitors

AGENCY: Department of the Navy, DoD.

ACTION: Notice of partially closed meeting.

SUMMARY: The U.S. Naval Academy Board of Visitors will meet to make such inquiry, as the Board shall deem necessary, into the state of morale and discipline, the curriculum, instruction, physical equipment, fiscal affairs, and academic methods of the Naval Academy. The executive session of this meeting from 11:00 a.m. to 12:00 p.m. on September 12, 2016, will include discussions of new and pending administrative/minor disciplinary infractions and non-judicial punishment proceedings involving midshipmen attending the Naval Academy to include but not limited to individual honor/conduct violations within the Brigade; the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. For this reason, the executive session of this meeting will be closed to the public.

DATES: The open session of the meeting will be held on September 12, 2016, from 9:00 a.m. to 11:00 a.m. The executive session held from 11:00 a.m. to 12:00 p.m. will be the closed portion of the meeting.

ADDRESSES: The meeting will be held at the Library of Congress, Washington, DC. The meeting will be handicap accessible.

FOR FURTHER INFORMATION CONTACT: Lieutenant Commander Eric Madonia, USN, Executive Secretary to the Board of Visitors, Office of the Superintendent, U.S. Naval Academy, Annapolis, MD 21402–5000, 410–293–1503.

SUPPLEMENTARY INFORMATION: This notice of meeting is provided per the Federal Advisory Committee Act, as amended (5 U.S.C. App.). The executive session of the meeting from 11:00 a.m. to 12:00 p.m. on September 12, 2016, will consist of discussions of new and pending administrative/minor disciplinary infractions and non-judicial punishments involving midshipmen attending the Naval Academy to include but not limited to, individual honor/conduct violations within the Brigade. The discussion of such information cannot be adequately segregated from other topics, which precludes opening the executive session of this meeting to the public. Accordingly, the Department of the Navy/Assistant for Administration has determined in writing that the meeting shall be partially closed to the public because the discussions during the executive session from 11:00 a.m. to 12:00 p.m. will be concerned with matters protected under sections 552b(c)(5), (6), and (7) of title 5, United States Code.

Authority: 5 U.S.C. 552b.

Dated: May 17, 2016.

N.A. Hagerty-Ford,

Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2016–12071 Filed 5–20–16; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Teacher Quality Partnership Grant Program

AGENCY: Office of Innovation and Improvement, Department of Education.

ACTION: Notice.

Overview Information:

Teacher Quality Partnership Grant Program.

Notice inviting applications for new awards for fiscal year (FY) 2016.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.336S.

DATES:

Applications Available: May 23, 2016.

Deadline for Notice of Intent to Apply: June 22, 2016.

Deadline for Transmittal of Applications: July 7, 2016.

Date of Pre-Application Webinars: The Office of Innovation and Improvement intends to hold Webinars designed to provide technical assistance to interested applicants for grants under the Teacher Quality Partnership (TQP) Grant Program. Details regarding the dates and times of these Webinars will be provided on the TQP Web site at *http://innovation.ed.gov/what-we-do/teacher-quality/teacher-quality-partnership/applicant-info-and-eligibility/.*

Deadline for Intergovernmental Review: September 20, 2016.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The TQP Grant Program aims to increase student achievement by improving the quality of new teachers and prospective teachers through enhanced preparation of prospective teachers and professional development activities for new teachers; holding teacher preparation programs at institutions of higher education (IHEs) accountable for preparing teachers who meet applicable State certification and licensure requirements; and recruiting individuals with strong content knowledge or a record of professional accomplishment, including minorities and individuals from occupations other than education, into the teaching force.

Background: The TQP Grant Program supports partnerships among (i) IHEs, (ii) high-need local educational agencies (LEAs), and (iii) high-need schools served by such LEAs or high-need early childhood education (ECE) programs. Under section 202(d) and (e) of the Higher Education Act of 1965, as amended (HEA), these partnerships must implement either (a) teacher preparation programs at the pre-baccalaureate or "fifth-year" level that include specific reforms in IHEs' existing teacher preparation programs and follow-up support for program completers who become teachers in partner LEAs, or (b) teacher residency programs in which individuals with strong academic or professional backgrounds but without teaching experience are teaching in high-need schools with support from mentor teachers, and concurrently enrolled in a Master's degree program. These two options are further explained in this notice under the *Absolute Priorities* section of this notice.

In the FY 2016 TQP competition, we are especially interested in supporting TQP projects that serve or are designed to serve tribal communities and rural areas, given the need for effective educators serving these communities. On November 5, 2009, pursuant to Executive Order 13175, President Obama issued a memorandum requiring each Federal agency to prepare a detailed plan of action the agency would take to consult with tribal officials when developing policies that have implications for tribal communities. Consistent with its responsibilities under the President's memorandum, the U.S. Department of Education (Department) conducted two consultation sessions by teleconference with tribal officials about the TQP program, on January 19 and 21, 2016. During these consultations, we provided participants with an overview of the TQP program and the current TQP grantees, and facilitated a discussion around potential opportunities and challenges that this grant program may provide for tribal communities. In addition, the Department solicited feedback and questions from tribal communities over a two-week period following the calls.

During this outreach, the Department received numerous comments and questions from participants. Some of these concerns were of a general nature and could affect all applicants, regardless of whether or not they serve Tribal communities. For example, participants were concerned about forming the necessary eligible partnership needed to apply, what entity should lead that effort, and what entity should serve as the lead applicant for the eligible partnership. Participants also expressed concern about whether their local LEAs or BIE-funded schools would meet the definition of a high-need LEA, as that term is defined in section 200 of HEA.

Some concerns raised by participants reflected the unique challenges facing tribal communities. For example, participants raised issues related to the status of Bureau of Indian Education-funded schools (*e.g.,* whether they are LEAs) in many tribal communities, and the role of two-year colleges in preparing and producing teachers to serve those communities. In addition, TQP staff learned that members of the Tribal community are widely familiar with the Indian Education Professional Development Grant program in the Department's Office of Elementary and Secondary Education, and sought additional information about the differences between that program and the TQP program.

Answers to these and other questions will be addressed in the upcoming TQP pre-application Webinars. Additionally, responses to questions and concerns addressed during the consultations also can be found in this notice inviting applications, and in the TQP Frequently Asked Questions (FAQ) document found at *http://innovation.ed.gov/what-we-do/teacher-quality/teacher-quality-partnership/.* The Department has also prepared a document that outlines the difference between the TQP and PDP programs. This document can be found as part of the TQP FAQ document.

We appreciate the dialogue with tribal leaders and the opportunity to gain insight into tribal communities. Due to the detailed statutory requirements for the TQP program in sections 200–204 of the HEA, the Department has limited flexibility to address all of the concerns raised during our consultation process. The consultations nevertheless confirmed that rural communities and tribal communities could greatly benefit from the TQP program, and therefore we have decided to encourage applications from rural and tribal communities through adoption of a competitive preference priority and an invitational priority that focus on the specific teaching needs of these communities.

Priorities: This notice contains two absolute priorities, one competitive preference priority, and one invitational priority. In accordance with 34 CFR 75.105(b)(2)(iv), Absolute Priority 1 is from section 202(d) of the HEA, and Absolute Priority 2 is from section 202(e) of the HEA. The competitive preference priority is from the Department's notice of final supplemental priorities and definitions for discretionary grant programs, published in the **Federal Register** on December 10, 2014 (79 FR 73425) (Supplemental Priorities).

Absolute Priorities: For FY 2016 and any subsequent year in which we make awards from the list of unfunded applications from this competition, these priorities are absolute priorities. All applications must address either Absolute Priority 1 or Absolute Priority 2 in order to be considered for funding, but not both. Under 34 CFR 75.105(c)(3) we consider only applications that meet Absolute Priority 1 or Absolute Priority 2. Applications that address both absolute priorities will not be reviewed.

Each of the two absolute priorities constitutes its own funding category. Assuming that applications in each funding category are of sufficient quality, the Secretary intends to award grants under each absolute priority.

Applications will be peer reviewed and scored based on the TQP program's selection criteria. Applications will be scored and placed in rank order by absolute priority; thus, applications that address each priority will be scored and ranked separately to create two funding slates. Applications that do not clearly identify the priority being addressed will not be reviewed.

These priorities are from section 202(d) and (e) of the HEA, and are:

Absolute Priority 1: Partnership Grants for the Preparation of Teachers.

Under this priority, an eligible partnership must carry out an effective pre-baccalaureate teacher preparation program or a fifth-year initial licensing program that includes all of the following:

(a) *Program Accountability.* Implementing reforms, described in paragraph (b) of this priority, within each teacher preparation program and, as applicable, each preparation program for early childhood education (ECE) programs, of the eligible partnership that is assisted under this priority, to hold each program accountable for—

(1) Preparing—

(i) New or prospective teachers to meet the applicable State certification and licensure requirements, including any requirements for certification obtained through alternative routes to certification, or, with regard to special education teachers, the qualifications described in section 612(a)(14)(C) of the Individuals with Disabilities Education Act (IDEA), (including teachers in rural school districts, special educators, and teachers of students who are limited English proficient);

(ii) Such teachers and, as applicable, early childhood educators, to understand empirically-based practice and scientifically valid research related to teaching and learning and the applicability of such practice and research, including through the effective use of technology, instructional techniques, and strategies consistent with the principles of universal design for learning, and through positive behavioral interventions and support strategies to improve student achievement; and

(iii) As applicable, early childhood educators to be highly competent; and

(2) Promoting strong teaching skills and, as applicable, techniques for early childhood educators to improve children's cognitive, social, emotional, and physical development.

Note: In addressing paragraph (a) of this priority, applicants may either discuss their implementation of reforms within all teacher preparation programs that the partner institution of higher education administers and that would be assisted under this TQP grant, or selected teacher preparation programs that need particular assistance and that would receive the TQP grant funding.

(b) *Required reforms.* The reforms described in paragraph (a) shall include—

(1) Implementing teacher preparation program curriculum changes that improve, evaluate, and assess how well all prospective and new teachers develop teaching skills;

(2) Using empirically-based practice and scientifically valid research, where applicable, about teaching and learning so that all prospective teachers and, as applicable, early childhood educators—

(i) Understand and can implement research-based teaching practices in classroom instruction;

(ii) Have knowledge of student learning methods;

(iii) Possess skills to analyze student academic achievement data and other measures of student learning and use such data and measures to improve classroom instruction;

(iv) Possess teaching skills and an understanding of effective instructional strategies across all applicable content areas that enable general education and special education teachers and early childhood educators to—

(A) Meet the specific learning needs of all students, including students with disabilities, students who are limited English proficient, students who are gifted and talented, students with low literacy levels, and, as applicable, children in ECE programs; and

(B) Differentiate instruction for such students;

(v) Can effectively participate as a member of the individualized education program team, as defined in section 614(d)(1)(B) of the IDEA; and

(vi) Can successfully employ effective strategies for reading instruction using the essential components of reading instruction;

(3) Ensuring collaboration with departments, programs, or units of a partner institution outside of the teacher preparation program in all academic content areas to ensure that prospective teachers receive training in both teaching and relevant content areas in order to meet the applicable State certification and licensure requirements, including any requirements for certification obtained through alternative routes to certification, or, with regard to special education teachers, the qualifications described in section 612(a)(14)(C) of the IDEA, which may include training in multiple subjects to teach multiple grade levels as may be needed for individuals preparing to teach in rural communities and for individuals preparing to teach students with disabilities;

(4) Developing and implementing an induction program;

(5) Developing admissions goals and priorities aligned with the hiring objectives of the high-need LEA in the eligible partnership; and

(6) Implementing program and curriculum changes, as applicable, to ensure that prospective teachers have the requisite content knowledge, preparation, and degree to teach Advanced Placement or International Baccalaureate courses successfully.

(c) *Clinical experience and interaction.* Developing and improving a sustained and high-quality preservice clinical education program to further develop the teaching skills of all prospective teachers and, as applicable, early childhood educators involved in the program. Such programs shall do the following—

(1) Incorporate year-long opportunities for enrichment, including—

(i) Clinical learning in classrooms in high-need schools served by the high-need LEA in the eligible partnership, and identified by the eligible partnership; and

(ii) Closely supervised interaction between prospective teachers and faculty, experienced teachers, principals, other administrators, and school leaders at ECE programs (as applicable), elementary schools, or secondary schools, and providing support for such interaction;

(2) Integrate pedagogy and classroom practice and promote effective teaching skills in academic content areas;

(3) Provide high-quality teacher mentoring;

(4) Be offered over the course of a program of teacher preparation;

(5) Be tightly aligned with course work (and may be developed as a fifth-year of a teacher preparation program);

(6) Where feasible, allow prospective teachers to learn to teach in the same LEA in which the teachers will work, learning the instructional initiatives and curriculum of that LEA;

(7) As applicable, provide training and experience to enhance the teaching skills of prospective teachers to better prepare such teachers to meet the unique needs of teaching in rural or urban communities; and

(8) Provide support and training for individuals participating in an activity for prospective or new teachers described in this paragraph, or paragraphs (a) and (b), or (d), and for individuals who serve as mentors for such teachers, based on each individual's experience. Such support may include—

(i) With respect to a prospective teacher or a mentor, release time for such individual's participation;

(ii) With respect to a faculty member, receiving course workload credit and compensation for time teaching in the eligible partnership's activities; and

(iii) With respect to a mentor, a stipend, which may include bonus, differential, incentive, or performance pay, based on the mentor's extra skills and responsibilities.

(d) *Induction programs for new teachers.* Creating an induction program for new teachers or, in the case of an ECE program, providing mentoring or coaching for new early childhood educators.

(e) *Support and training for participants in ECE programs.* In the case of an eligible partnership focusing on early childhood educator preparation, implementing initiatives that increase compensation for early childhood educators who attain associate or baccalaureate degrees in ECE.

(f) *Teacher recruitment.* Developing and implementing effective mechanisms (which may include alternative routes to State certification of teachers) to ensure that the eligible partnership is able to recruit qualified individuals to become teachers who meet the applicable State certification and licensure requirements, including any requirements for certification obtained through alternative routes to certification, or, with regard to special education teachers, the qualifications described in section 612(a)(14)(C) of the IDEA through the activities of the eligible partnership, which may include an emphasis on recruiting into the teaching profession—

(1) Individuals from underrepresented populations;

(2) Individuals to teach in rural communities and teacher shortage areas, including mathematics, science, special education, and the instruction of limited English proficient students; and

(3) Mid-career professionals from other occupations, former military personnel, and recent college graduates with a record of academic distinction.

(g) *Literacy training.* Strengthening the literacy teaching skills of prospective and, as applicable, new elementary school and secondary school teachers—

(1) To implement literacy programs that incorporate the essential components of reading instruction;

(2) To use screening, diagnostic, formative, and summative assessments to determine students' literacy levels, difficulties, and growth in order to improve classroom instruction and improve student reading and writing skills;

(3) To provide individualized, intensive, and targeted literacy instruction for students with deficiencies in literacy skills; and

(4) To integrate literacy skills in the classroom across subject areas.

Absolute Priority 2: Partnership Grants for the Establishment of Effective Teaching Residency Programs.

Under this priority, an eligible partnership must carry out an effective teaching residency program that includes all of the following activities:

(a) Supporting a teaching residency program described in paragraph II (a) for high-need subjects and areas, as determined by the needs of the high-need LEA in the partnership;

(b) Placing graduates of the teaching residency program in cohorts that facilitate professional collaboration, both among graduates of the teaching residency program and between such graduates and mentor teachers in the receiving school;

(c) Ensuring that teaching residents who participate in the teaching residency program receive—

(1) Effective pre-service preparation as described in paragraph II;

(2) Teacher mentoring;

(3) Support required through the induction program as the teaching residents enter the classroom as new teachers; and

(4) The preparation described in paragraphs (c)(1), (2), and (3) of Absolute Priority 2.

II. Teaching Residency Programs.

(a) *Establishment and design.* A teaching residency program under this priority is a program based upon models of successful teaching residencies that serves as a mechanism to prepare teachers for success in the high-need schools in the eligible partnership, and must be designed to include the following characteristics of successful programs:

(1) The integration of pedagogy, classroom practice, and teacher mentoring;

(2) Engagement of teaching residents in rigorous graduate-level course work leading to a master's degree while undertaking a guided teaching apprenticeship;

(3) Experience and learning opportunities alongside a trained and experienced mentor teacher—

(i) Whose teaching shall complement the residency program so that classroom clinical practice is tightly aligned with coursework;

(ii) Who shall have extra responsibilities as a teacher leader of the teaching residency program, as a mentor for residents, and as a teacher coach during the induction program for new teachers; and for establishing, within the program, a learning community in which all individuals are expected to continually improve their capacity to advance student learning; and

(iii) Who may be relieved from teaching duties as a result of such additional responsibilities;

(4) The establishment of clear criteria for the selection of mentor teachers based on measures of teacher effectiveness and the appropriate subject area knowledge. Evaluation of teacher effectiveness must be based on, but not limited to, observations of the following—

(i) Planning and preparation, including demonstrated knowledge of content, pedagogy, and assessment, including the use of formative and diagnostic assessments to improve student learning;

(ii) Appropriate instruction that engages students with different learning styles;

(iii) Collaboration with colleagues to improve instruction;

(iv) Analysis of gains in student learning, based on multiple measures that are valid and reliable and that, when feasible, may include valid, reliable, and objective measures of the influence of teachers on the rate of student academic progress; and

(v) In the case of mentor candidates who will be mentoring new or prospective literacy and mathematics coaches or instructors, appropriate skills in the essential components of reading instruction, teacher training in literacy instructional strategies across core subject areas, and teacher training in mathematics instructional strategies, as appropriate;

(5) Grouping of teaching residents in cohorts to facilitate professional collaboration among such residents;

(6) The development of admissions goals and priorities—

(i) That are aligned with the hiring objectives of the LEA partnering with the program, as well as the instructional initiatives and curriculum of such agency, in exchange for a commitment by such agency to hire qualified graduates from the teaching residency program; and

(ii) Which may include consideration of applicants that reflect the communities in which they will teach as well as consideration of individuals from underrepresented populations in the teaching profession; and

(7) Support for residents, once the teaching residents are hired as teachers of record, through an induction program, professional development, and networking opportunities to support the residents through not less than the residents' first two years of teaching.

(b) *Selection of individuals as teacher residents.*

(1) *Eligible Individual.* In order to be eligible to be a teacher resident in a teaching residency program under this priority, an individual shall—

(i) Be a recent graduate of a four-year IHE or a mid-career professional from outside the field of education possessing strong content knowledge or a record of professional accomplishment; and

(ii) Submit an application to the teaching residency program.

(2) *Selection Criteria.* An eligible partnership carrying out a teaching residency program under this priority shall establish criteria for the selection of eligible individuals to participate in the teaching residency program based on the following characteristics—

(i) Strong content knowledge or record of accomplishment in the field or subject area to be taught;

(ii) Strong verbal and written communication skills, which may be demonstrated by performance on appropriate tests; and

(iii) Other attributes linked to effective teaching, which may be determined by interviews or performance assessments, as specified by the eligible partnership.

(c) *Stipends or salaries; applications; agreements; repayments.*

(1) *Stipends or salaries.* A teaching residency program under this priority shall provide a one-year living stipend or salary to teaching residents during the teaching residency program;

(2) *Applications for stipends or salaries.* Each teacher residency candidate desiring a stipend or salary during the period of residency shall submit an application to the eligible partnership at such time, and containing such information and assurances, as the eligible partnership may require;

(3) *Agreements to serve.* Each application submitted under paragraph (c)(2) of this priority shall contain or be accompanied by an agreement that the applicant will—

(i) Serve as a full-time teacher for a total of not less than three academic years immediately after successfully completing the teaching residency program;

(ii) Fulfill the requirement under paragraph (c)(3)(i) of this priority by teaching in a high-need school served by the high-need LEA in the eligible partnership and teach a subject or area that is designated as high-need by the partnership;

(iii) Provide to the eligible partnership a certificate, from the chief administrative officer of the LEA in which the resident is employed, of the employment required under paragraph (c)(3)(i) and (ii) of this priority at the beginning of, and upon completion of, each year or partial year of service;

(iv) Meet the applicable State certification and licensure requirements, including any requirements for certification obtained through alternative routes to certification, or, with regard to special education teachers, the qualifications described in section 612(a)(14)(C) of the IDEA, when the applicant begins to fulfill the service obligation under this clause; and

(v) Comply with the requirements set by the eligible partnership under paragraph (e) of this priority if the applicant is unable or unwilling to complete the service obligation required by the paragraph.

(d) *Repayments.*

(1) *In general.* A grantee carrying out a teaching residency program under this priority shall require a recipient of a stipend or salary under paragraph (c)(1) of this priority who does not complete, or who notifies the partnership that the recipient intends not to complete, the service obligation required by paragraph (c)(3) of this priority to repay such stipend or salary to the eligible partnership, together with interest, at a rate specified by the partnership in the agreement, and in accordance with such other terms and conditions specified by the eligible partnership, as necessary;

(2) *Other terms and conditions.* Any other terms and conditions specified by the eligible partnership may include reasonable provisions for pro rata repayment of the stipend or salary described in paragraph (c)(1) of this priority or for deferral of a teaching resident's service obligation required by paragraph (c)(3) of this priority, on grounds of health, incapacitation, inability to secure employment in a school served by the eligible partnership, being called to active duty in the Armed Forces of the United States, or other extraordinary circumstances;

(3) *Use of repayments.* An eligible partnership shall use any repayment received under paragraph (d) to carry out additional activities that are consistent with the purposes of this priority.

Competitive Preference Priority: For FY 2016 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, this priority is a competitive preference priority. The priority comes from the Secretary's Supplemental Priorities and Definitions for Discretionary Grant Programs (Secretary's Supplemental Priorities) published in the **Federal Register** on December 10, 2014 at 79 FR 73426, 73451.

If an applicant chooses to address the competitive preference priority, the project narrative section of its application must identify its response to this competitive preference priority. The Department will not review or award points under this competitive preference priority if the applicant fails to clearly identify its response in its application. Under 34 CFR 75.105(c)(2)(i) we award up to an additional fifteen points to an application, depending on how well the application addresses the competitive preference priority. An applicant is not required to address both paragraphs (a) and (b) of the competitive preference priority in order to receive the full 15 points.

Only applicants that are highly rated on the selection criteria for Absolute Priority 1 or Absolute Priority 2 will be eligible to receive competitive preference points.

The priority is:

Competitive Preference Priority: Supporting High-Need Students (up to 15 points).

Projects that are designed to improve academic outcomes for one or both of the following groups of students:

(a) Students who are members of federally-recognized Indian Tribes.

(b) Students served by rural LEAs (as defined in this notice).

Within this competitive preference priority, we are particularly interested in applications that address the following invitational priority.

Invitational Priority: Under 34 CFR 75.105(c)(1) we do not give an application that meets this invitational priority a competitive or absolute preference over other applications.

This priority is:

Enhancing Cultural Competencies to Support High-Need Students.

(a) Under this priority, the Department invites applicants to propose a TQP project that will provide project participants with specific coursework, experiences, and professional development to enable them to gain cultural competencies and content knowledge, and related pedagogical skills, to support the learning needs of American Indian and Alaska Native students, rural students, or both.

(b) In responding to this invitational priority, applicants are encouraged to include the following elements in their proposed projects:

(1) An identification of the proposed population(s) to be served in the partner high-need LEA(s), including data that document a high number or high concentration of American Indian and Alaska Native and/or rural students to be served, as well as data regarding how the project will address the unique challenges of serving the identified population(s).

(2) A description of how the project will promote collaboration across partner institutions of higher education to ensure that TQP project participants who intend to teach American Indian and Alaska Native and/or rural students have access to coursework, experiences, and professional development that will build both cultural competency and content knowledge to teach students in the identified population(s) effectively.

(3) A description of how the grantee will align its proposed TQP project activities with the appropriate State licensure standards and, how it will implement strategies that translate those standards into classroom practice with regard to the identified population(s).

Definitions: The definitions for "Early childhood educator," "High-need early childhood education (ECE) program," "High-need local educational agency (LEA)", "High-need school," and "Partner institution" are from section 200 of the HEA. The definitions for "Logic model," "Relevant outcome," and "Strong theory" are from 34 CFR 77.1. The definitions for "high minority school," "high-need students," "regular high school diploma," and "rural local education agency" are from the Secretary's Supplemental Priorities.

Early childhood educator means an individual with primary responsibility for the education of children in an early childhood education program.

High-minority school means a school as that term is defined by a local educational agency (LEA), which must define the term in a manner consistent with its State's Teacher Equity Plan, as required by section 1111(b)(8)(C) of the Elementary and Secondary Education Act of 1965, as amended (ESEA). The applicant must provide the definition(s) of High-minority Schools used in its application.

High-need early childhood education (ECE) program means an ECE program serving children from low-income families that is located within the geographic area served by a high-need LEA.

High-need local educational agency (LEA) means an LEA—

(i)(A) For which not less than 20 percent of the children served by the agency are children from low-income families;

(B) That serves not fewer than 10,000 children from low-income families;

(C) That meets the eligibility requirements for funding under the Small, Rural School Achievement (SRSA) Program under section 5211(b) of the ESEA; or

(D) That meets eligibility requirements for funding under the Rural and Low-Income School (RLIS) Program under section 6211(b) of the ESEA; and—

(ii)(A) For which there is a high percentage of teachers not teaching in the academic subject areas or grade levels in which the teachers were trained to teach; or

(B) For which there is a high teacher turnover rate or a high percentage of teachers with emergency, provisional, or temporary certification or licensure.

Note: Information on how an applicant may demonstrate that a partner LEA meets this definition is included in the application package.

High-need school means a school that, based on the most recent data available, meets one or both of the following:

(i) The school is in the highest quartile of schools in a ranking of all schools served by an LEA, ranked in descending order by percentage of students from low-income families enrolled in such schools, as determined by the LEA based on one of the following measures of poverty:

(A) The percentage of students aged 5 through 17 in poverty counted in the most recent census data approved by the Secretary.

(B) The percentage of students eligible for a free or reduced price school lunch under the Richard B. Russell National School Lunch Act.

(C) The percentage of students in families receiving assistance under the State program funded under Part A of Title IV of the Social Security Act.

(D) The percentage of students eligible to receive medical assistance under the Medicaid program.

(E) A composite of two or more of the measures described in paragraphs (A) through (D).

(ii) In the case of—

(A) An elementary school, the school serves students not less than 60 percent of whom are eligible for a free or reduced price school lunch under the Richard B. Russell National School Lunch Act; or

(B) Any other school that is not an elementary school, the other school serves students not less than 45 percent of whom are eligible for a free or reduced price school lunch under the Richard B. Russell National School Lunch Act.

(iii) The Secretary may, upon approval of an application submitted by an eligible partnership seeking a grant under this title, designate a school that does not qualify as a high-need school under this definition, as a high-need school for the purpose of this title. The Secretary shall base the approval of an application for designation of a school under this clause on a consideration of the information required under section 200 (II)(B)(ii) of the HEA, and may also take into account other information submitted by the eligible partnership.

Note: Information on how an applicant may demonstrate that a partner LEA meets this definition is included in the application package.

High-need students means students who are at risk of educational failure or otherwise in need of special assistance and support, such as students who are living in poverty, who attend high-minority schools, who are far below grade level, who have left school before receiving a regular high school diploma, who are at risk of not graduating with a diploma on time, who are homeless, who are in foster care, who have been incarcerated, who have disabilities, or who are English learners.

Logic model (also referred to as a theory of action) means a well-specified conceptual framework that identifies key components of the proposed process, product, strategy, or practice (*i.e.*, the active "ingredients" that are hypothesized to be critical to achieving the relevant outcomes) and describes the relationships among the key components and outcomes, theoretically and operationally.

Partner institution means an IHE, which may include a two-year IHE offering a dual program with a partner four-year IHE, participating in an eligible partnership that has a teacher preparation program—

(i) Whose graduates exhibit strong performance on State determined qualifying assessments for new teachers through—

(A) Demonstrating that 80 percent or more of the graduates of the program who intend to enter the field of teaching have passed all of the applicable State qualification assessments for new teachers, which shall include an assessment of each prospective teacher's subject matter knowledge in the content area in which the teacher intends to teach; or

(B) Being ranked among the highest-performing teacher preparation programs in the State as determined by the State—

(1) Using criteria consistent with the requirements for the State Report Card under section 205(b) of the HEA before the first publication of the report card; and

(2) Using the State report card on teacher preparation required under section 205(b), after the first publication of such report card and for every year thereafter; and

(ii) That requires—

(A) Each student in the program to meet high academic standards or demonstrate a record of success, as determined by the institution (including prior to entering and being accepted into a program), and participate in intensive clinical experience;

(B) Each student in the program preparing to become a teacher who meets the applicable State certification and licensure requirements, including any requirements for certification obtained through alternative routes to certification, or, with regard to special education teachers, the qualifications described in section 612(a)(14)(C) of the IDEA; and

(C) Each student in the program preparing to become an early childhood educator to meet degree requirements, as established by the State, and become highly competent.

Note: For purposes of paragraph (ii)(C) of this definition, the term "highly competent," under section 200(12) of the HEA, when used with respect to an early childhood educator, means an educator—

(a) With specialized education and training in development and education of young children from birth until entry into kindergarten;

(b) With—

(i) A baccalaureate degree in an academic major in the arts and sciences; or

(ii) An associate's degree in a related educational area; and

(c) Who has demonstrated a high level of knowledge and use of content and pedagogy in the relevant areas associated with quality ECE.

Regular high school diploma means the standard high school diploma that is awarded to students in the State and that is fully aligned with the State's academic content standards or a higher diploma and does not include a General Education Development (GED) credential, certificate of attendance, or any alternative award.

Relevant outcome means the student outcome (or the ultimate outcome if not related to students) the proposed process, product, strategy, or practice is designed to improve, as consistent with the specific goals of a program.

Rural local education agency means a local educational agency (LEA) that is eligible under the Small Rural School Achievement (SRSA) program or the Rural and Low-Income School (RLIS) program authorized under Title VI, Part B of the Elementary and Secondary Education Act of 1965, as amended (ESEA). Eligible applicants may determine whether a particular LEA is eligible for these programs by referring to information on the Department's Web site at *www2.ed.gov/nclb/freedom/local/reap.html.*

Strong theory means a rationale for the proposed process, product, strategy, or practice that includes a logic model.

Note: Definitions for the following terms that also apply to this program are in section 200 of the HEA: "arts and sciences," "induction program," "limited English proficient," "professional development," "scientifically valid research," and "teacher mentoring."

Program Authority: 20 U.S.C. 1021–1022c.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 75, 77, 79, 82, 84, 86, 97, 98, and 99. (b) The OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474. (d) The Supplemental Priorities (79 FR 73425).

Note: The regulations in 34 CFR part 79 apply to all applicants except federally-recognized Indian tribes.

Note: The regulations in 34 CFR part 86 apply to IHEs only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $5,000,000.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2017 from the list of unfunded applications from this competition.

Estimated Range of Awards: $500,000–$1,500,000.

Estimated Average Size of Awards: $1,000,000 for the first year of the project. Funding for the second, third, fourth, and fifth years is subject to the availability of funds and the approval of continuation awards (see 34 CFR 75.253).

Maximum Award: We will not award more than $1,500,000 to any applicant for a budget period of 12 months.

Estimated Number of Awards: 3–5.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* An eligible applicant must be an "eligible partnership" as defined in section 200(6) of the HEA. The term "eligible partnership" means an entity that—

(1) Must include:

(i) A high-need LEA;

(ii)(A) A high-need school or consortium of high-need schools served by the high-need LEA, or

(B) As applicable, a high-need ECE program;

(iii) A partner institution;

(iv) A school, department, or program of education within such partner institution, which may include an existing teacher professional development program with proven outcomes within a four-year IHE that provides intensive and sustained collaboration between faculty and LEAs consistent with the requirements of title II of the HEA;

(v) A school or department of arts and sciences within such partner institution; and

(2) May include any of the following—

(i) The Governor of the State.

(ii) The State educational agency.

(iii) The State board of education.

(iv) The State agency for higher education.

(v) A business.

(vi) A public or private nonprofit educational organization.

(vii) An educational service agency.

(viii) A teacher organization.

(ix) A high-performing LEA, or a consortium of such LEAs, that can serve as a resource to the partnership.

(x) A charter school (as defined in section 5210 of the ESEA).

(xi) A school or department within the partner institution that focuses on psychology and human development.

(xii) A school or department within the partner institution with comparable expertise in the disciplines of teaching, learning, and child and adolescent development.

(xiii) An entity operating a program that provides alternative routes to State certification of teachers. Any of the mandatory or optional entities in the partnership may be the fiscal agent of the grant.

Note: So that the Department can confirm the eligibility of the LEA(s) that an applicant proposes to serve, applicants must include information in their applications that demonstrates that each LEA to be served by the project is a "high-need LEA" (as defined in this notice and in section 200(10) of the HEA).

Applicants should review the application package for additional information on determining whether an LEA meets the definition of "high-need LEA."

Additionally, applicants must also partner with a school or department of arts and sciences within the partner institution. More information on eligible partnerships can be found in the TQP FAQ document found on the program Web site at *http://innovation.ed.gov/what-we-do/teacher-quality/teacher-quality-partnership/.*

2.a. *Cost Sharing or Matching:* Under section 203(c) of the HEA (20 U.S.C. 1022b), each grant recipient must provide, from non-Federal sources, an amount equal to 100 percent of the amount of the grant, which may be provided in cash or in-kind, to carry out the activities supported by the grant. Grantees must budget their matching contributions on an annual basis relative to each annual award of TQP Grant Program funds.

The HEA also authorizes the Secretary to waive this matching requirement for any fiscal year for an eligible partnership if the Secretary determines that applying the matching requirement to the eligible partnership would result in serious hardship or an inability to carry out the authorized activities described in section 202 of the HEA. Applicants that wish to apply for a waiver for year one or for future years of the project may include a request in their application that describes why the 100 percent matching requirement would cause serious hardship or an inability to carry out project activities. Further information about applying for waivers can be found in the application package. However, given the importance of matching funds to the long-term success of the project, the Secretary expects eligible entities to identify appropriate matching funds.

b. *Supplement-Not-Supplant:* This program involves supplement-not-supplant funding requirements. In accordance with section 202(k) of the HEA, funds made available under this program must be used to supplement, and not supplant, other Federal, State, and local funds that would otherwise be expended to carry out activities under this program. For any high-need LEA that is funded by the Department of Interior's Bureau of Indian Education, the Secretary considers funds the LEA received from the Department of Interior's annual appropriation to be non-Federal funds.

3. Other:

General Application Requirements:

All applicants must meet the following general application requirements in order to be considered for funding. Except as specifically noted in this section, the general application requirements are from section 202 of the HEA (20 U.S.C. 1022a).

Each eligible partnership desiring a grant under this program must submit an application that contains—

(a) A needs assessment of the partners in the eligible partnership with respect to the preparation, ongoing training, professional development, and retention of general education and special education teachers, principals, and, as applicable, early childhood educators;

(b) A description of the extent to which the program to be carried out with grant funds, as described in Absolute Priority 1 or Absolute Priority 2, in this notice, and, if the applicant chooses to do so, a Partnership Grant for the Development of Leadership Program, as described in section 202(f) of the HEA, will prepare prospective and new teachers with strong teaching skills;

(c) A description of how such a program will prepare prospective and new teachers to understand and use research and data to modify and improve classroom instruction;

(d) A description of—

(1) How the eligible partnership will coordinate strategies and activities assisted under the grant with other teacher preparation or professional development programs, and

(2) How the activities of the partnership will be consistent with State, local, and other education reform activities that promote teacher quality and student academic achievement;

(e) An assessment that describes the resources available to the eligible partnership, including—

(1) The integration of funds from other related sources;

(2) The intended use of the grant funds; and

(3) The commitment of the resources of the partnership to the activities assisted under this program, including financial support, faculty participation, and time commitments, and to the continuation of the activities when the grant ends.

(f) A description of—

(1) How the eligible partnership will meet the purposes of the TQP Grant Program as specified in section 201 of the HEA;

(2) How the partnership will carry out the activities required under Absolute Priority 1 or Absolute Priority 2, as described in this notice, based on the needs identified in paragraph (a), with the goal of improving student academic achievement;

(4) The partnership's evaluation plan under section 204(a) of the HEA;

(5) How the partnership will align the teacher preparation program with the—

(i) State early learning standards for ECE programs, as appropriate, and with the relevant domains of early childhood development; and

(ii) Student academic achievement standards and academic content standards under section 1111(b)(1) of the ESEA as amended by ESSA, established by the State in which the partnership is located;

(6) How the partnership will prepare general education teachers to teach students with disabilities, including training related to participation as a member of individualized education program teams, as defined in section 614(d)(1)(B) of the IDEA;

(7) How the partnership will prepare general education and special education teachers to teach students who are limited English proficient;

(8) How faculty at the partner institution will work during the term of the grant, with teachers who meet the applicable State certification and licensure requirements, including any requirements for certification obtained through alternative routes to certification, or, with regard to special education teachers, the qualifications described in section 612(a)(14)(C) of the Individuals with Disabilities Education Act, in the classrooms of high-need schools served by the high-need LEA in the partnership to—

(i) Provide high-quality professional development activities to strengthen the content knowledge and teaching skills of elementary school and secondary school teachers; and

(ii) Train other classroom teachers to implement literacy programs that incorporate the essential components of reading instruction;

(9) How the partnership will design, implement, or enhance a year-long and rigorous teaching preservice clinical program component;

(10) How the partnership will support in-service professional development strategies and activities; and

(11) How the partnership will collect, analyze, and use data on the retention of all teachers and early childhood educators in schools and ECE programs located in the geographic area served by the partnership to evaluate the effectiveness of the partnership's teacher and educator support system.

(g) With respect to the induction program required as part of the activities carried out under Absolute Priority 1 or Absolute Priority 2—

(1) A demonstration that the schools and departments within the IHE that are part of the induction program will effectively prepare teachers, including providing content expertise and expertise in teaching, as appropriate;

(2) A demonstration of the eligible partnership's capability and commitment to, and the accessibility to and involvement of faculty in, the use of empirically-based practice and scientifically valid research on teaching and learning;

(3) A description of how the teacher preparation program will design and implement an induction program to support, through not less than the first two years of teaching, all new teachers who are prepared by the teacher preparation program in the partnership and who teach in the high-need LEA in the partnership, and, to the extent practicable, all new teachers who teach in such high-need LEA, in the further development of the new teachers' teaching skills, including the use of mentors who are trained and compensated by such program for the mentors' work with new teachers; and

(4) A description of how faculty involved in the induction program will

be able to substantially participate in an ECE program or elementary school or secondary school classroom setting, as applicable, including release time and receiving workload credit for such participation.

IV. Application and Submission Information

1. *Address to Request Application Package:* Mia Howerton, U.S. Department of Education, 400 Maryland Avenue SW., Room 4w205, Washington, DC 20202. Telephone: (202) 205–0147 or by email: *tqpartnership@ed.gov*.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.*, braille, large print, audiotape, or compact disc) by contacting the program contact person listed in this section.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this program.

Notice of Intent to Apply: June 22, 2016.

The Department will be able to develop a more efficient process for reviewing grant applications if it has a better understanding of the number of entities that intend to apply for funding under this competition. Therefore, the Secretary strongly encourages each potential applicant to notify the Department of its intent to submit an application for funding by completing the FY 16 Intent to Apply survey at *https://www.surveymonkey.com/r/tqpfy16*.

Applicants that fail to complete the FY 16 Intent to Apply survey may still apply for funding.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you limit the application narrative (Part III) to no more than 50 pages, using the following standards:

- A "page" is 8.5″ x 11″, on one side only, with 1" margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions. However, you may single space all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman or Arial Narrow) will not be accepted.

The recommended page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, the recommended page limit does apply to all of the application narrative (Part III).

b. *Submission of Proprietary Information:* Given the types of projects that may be proposed in applications for the TQP Grant Program, your application may include business information that you consider proprietary. In 34 CFR 5.11 we define "business information" and describe the process we use in determining whether any of that information is proprietary and, thus, protected from disclosure under Exemption 4 of the Freedom of Information Act (5 U.S.C 552, as amended).

Because we plan to post the project narrative section of funded TQP Grant Program applications on our Web site, you may wish to request confidentiality of business information.

Consistent with Executive Order 12600, please designate in your application any information that you believe is exempt from disclosure under Exemption 4. In the appropriate Appendix section of your application, under "Other Attachments Form," please list the page number or numbers on which we can find this information. For additional information please see 34 CFR 5.11(c).

3. *Submission Dates and Times:*

Applications Available: May 23, 2016.

Deadline for Notice of Intent to Apply: June 22, 2016.

Date of Pre-Application Webinars: The TQP program intends to hold Webinars designed to provide technical assistance to interested applicants. Details regarding the dates and times of these Webinars will be provided on the TQP Web site at *http://innovation.ed.gov/what-we-do/teacher-quality/teacher-quality-partnership/applicant-info-and-eligibility/*.

Deadline for Transmittal of Applications: July 7, 2016.

Applications for grants under this program must be submitted electronically using the Grants.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery, if you qualify for an exception to the electronic submission requirement, please refer to *Other Submission Requirements* in section IV of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

Deadline for Intergovernmental Review: September 20, 2016.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

5. *Funding Restrictions:* We specify unallowable costs in 2 CFR 200, subpart E. We reference regulations outlining funding restrictions in the Applicable Regulations section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and System for Award Management:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the System for Award Management (SAM) (formerly the Central Contractor Registry), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active SAM registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet at the following Web site: *http://fedgov.dnb.com/webform*.

A DUNS number can be created within one to two business days.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow two to five weeks for your TIN to become active.

The SAM registration process can take approximately seven business days, but may take upwards of several weeks, depending on the completeness and accuracy of the data you enter into the SAM database. Thus, if you think you might want to apply for Federal financial assistance under a program administered by the Department, please allow sufficient time to obtain and register your DUNS number and TIN. We strongly recommend that you register early.

Note: Once your SAM registration is active, it may be 24 to 48 hours before you can access the information in, and submit an application through, *Grants.gov*.

If you are currently registered with SAM, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your registration annually. This may take three or more business days.

Information about SAM is available at *www.SAM.gov*. To further assist you with obtaining and registering your DUNS number and TIN in SAM or updating your existing SAM account, we have prepared a *SAM.gov* Tip Sheet, which you can find at: *http://www2.ed.gov/fund/grant/apply/sam-faqs.html*.

In addition, if you are submitting your application via *Grants.gov*, you must (1) be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with *Grants.gov* as an AOR. Details on these steps are outlined at the following *Grants.gov* Web page: *www.grants.gov/web/grants/register.html*.

7. *Other Submission Requirements:* Applications for grants under this program must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.* Applications for grants under the TQP Grant Program, CFDA number 84.336S, must be submitted electronically using the Governmentwide *Grants.gov* Apply site at *www.Grants.gov*. Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not email an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement *and* submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for the TQP Grant Program at *www.Grants.gov*. You must search for the downloadable application package for this program by the CFDA number. Do not include the CFDA number's alpha suffix in your search (*e.g.,* search for 84.336, not 84.336S).

Please note the following:

- When you enter the *Grants.gov* site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by *Grants.gov* are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the *Grants.gov* system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the *Grants.gov* system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from *Grants.gov*, we will notify you if we are rejecting your application because it was date and time stamped by the *Grants.gov* system after 4:30:00 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through *Grants.gov*.
- You should review and follow the Education Submission Procedures for submitting an application through *Grants.gov* that are included in the application package for this program to ensure that you submit your application in a timely manner to the *Grants.gov* system. You can also find the Education Submission Procedures pertaining to *Grants.gov* under News and Events on the Department's G5 system home page at *www.G5.gov*. In addition, for specific guidance and procedures for submitting an application through *Grants.gov*, please refer to the *Grants.gov* Web site at: *www.grants.gov/web/grants/applicants/apply-for-grants.html*.
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information you typically provide on the following forms: The Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- You must upload any narrative sections and all other attachments to your application as files in a read-only, non-modifiable Portable Document Format (PDF). Do not upload an interactive or fillable PDF file. If you upload a file type other than a read-only, non-modifiable PDF (*e.g.,* Word, Excel, WordPerfect, etc.) or submit a password-protected file, we will not review that material. Please note that this could result in your application not being considered for funding because the material in question—for example, the project narrative—is critical to a meaningful review of your proposal. For that reason it is important to allow yourself adequate time to upload all material as PDF files. The Department will not convert material from other formats to PDF. Additional, detailed information on how to attach files is in the application instructions.
- Your electronic application must comply with any page-limit requirements described in this notice.
- After you electronically submit your application, you will receive from *Grants.gov* an automatic notification of receipt that contains a *Grants.gov* tracking number. This notification indicates receipt by *Grants.gov* only, not receipt by the Department. *Grants.gov* will also notify you automatically by email if your application met all the *Grants.gov* validation requirements or if there were any errors (such as submission of your application by someone other than a registered

Authorized Organization Representative, or inclusion of an attachment with a file name that contains special characters). You will be given an opportunity to correct any errors and resubmit, but you must still meet the deadline for submission of applications.

Once your application is successfully validated by *Grants.gov*, the Department will retrieve your application from *Grants.gov* and send you an email with a unique PR/Award number for your application.

These emails do not mean that your application is without any disqualifying errors. While your application may have been successfully validated by *Grants.gov*, it must also meet the Department's application requirements as specified in this notice and in the application instructions. Disqualifying errors could include, for instance, failure to upload attachments in a read-only, non-modifiable PDF; failure to submit a required part of the application; or failure to meet applicant eligibility requirements. It is your responsibility to ensure that your submitted application has met all of the Department's requirements.

- We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through *Grants.gov*, please contact the *Grants.gov* Support Desk, toll free, at 1–800–518–4726. You must obtain a *Grants.gov* Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the *Grants.gov* system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an explanation of the technical problem you experienced with *Grants.gov*, along with the *Grants.gov* Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the *Grants.gov* system and that the problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. We will contact you after we determine whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the *Grants.gov* system. We will not grant you an extension if you failed to fully register to submit your application to *Grants.gov* before the application deadline date and time or if the technical problem you experienced is unrelated to the *Grants.gov* system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the *Grants.gov* system because—

- You do not have access to the Internet; or
- You do not have the capacity to upload large documents to the *Grants.gov* system; *and*
- No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevents you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Mia Howerton, U.S. Department of Education, 400 Maryland Avenue SW., Room 4w205, Washington, DC 20202–5960. FAX: (202) 205–5630.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.336S) LBJ Basement Level 1, 400 Maryland Avenue SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

We will not consider applications postmarked after the application deadline date.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.336S), 550 12th Street SW., Room 7039, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this program are from 34 CFR 75.210. An applicant may earn up to a total of 100 points based on the selection criteria. The maximum score for each criterion is indicated in parentheses. Each criterion also includes the sub-factors that the reviewers will consider in determining how well an application meets the criterion. The criteria are as follows:

(a) *Significance* (up to 10 points).

In determining the significance of the proposed project, the Secretary considers the following factors—

(i) The extent to which the proposed project is likely to build local capacity to provide, improve, or expand services that address the needs of the target population.

(ii) The importance or magnitude of the results or outcomes likely to be attained by the proposed project, especially improvements in teaching and student achievement.

(b) *Quality of the Project Design* (up to 35 points).

In determining the quality of the design of the proposed project, the Secretary considers the extent to which the proposed project consists of a comprehensive plan that includes a description of—

(i) The extent to which the proposed project is supported by strong theory (as defined in this notice).

(ii) The extent to which the services to be provided by the proposed project involve the collaboration of appropriate partners for maximizing the effectiveness of project services.

(iii) The extent to which the proposed project represents an exceptional approach to the priority or priorities established for this competition.

Note: Applicants are encouraged to develop logic models. These logic models should include the applicant's plan to implement and evaluate the proposed project. Applicants should connect available evidence of past history of successful outcomes to their logic models. Applicants may use resources such as the Pacific Education Laboratory's Education Logic Model Application (*http://relpacific.mcrel.org/resources/elm-app*) to help design their logic models.

(c) *Quality of the Management Plan* (up to 30 points).

In determining the quality of the management plan for the proposed project, the Secretary considers the following factors—

(i) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks.

(ii) The extent to which performance feedback and continuous improvement are integral to the design of the proposed project.

(d) *Quality of the Project Evaluation* (up to 25 points).

In determining the quality of the evaluation, the Secretary considers—

(i) The extent to which the methods of evaluation will provide valid and reliable performance data on relevant outcomes.

(ii) The extent to which the methods of evaluation are thorough, feasible, and appropriate to the goals, objectives, and outcomes of the proposed project.

(iii) The extent to which the methods of evaluation will provide performance feedback and permit periodic assessment of progress toward achieving intended outcomes.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Risk Assessment and Special Conditions:* Consistent with 2 CFR 200.205, before awarding grants under this competition the Department conducts a review of the risks posed by applicants. Under 2 CFR 3474.10, the Secretary may impose special conditions and, in appropriate circumstances, high risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

(c) Under 34 CFR 75.250(b), the Secretary may provide a grantee with additional funding for data collection analysis and reporting. In this case the Secretary establishes a data collection period.

4. *Performance Measures:* The goal of the TQP Grant Program is to increase student achievement in K–12 schools by developing teachers who meet applicable State certification and licensure requirements. Under GPRA, the following measures will be used by the Department in assessing the performance of this program:

(a) *Performance Measure 1: Certification/Licensure.* The percentage of program graduates who have attained initial State certification/licensure by passing all necessary licensure/certification assessments within one year of program completion.

(b) *Performance Measure 2: 1-Year Persistence.* The percentage of program participants who were enrolled in the postsecondary program in the previous grant reporting period, did not graduate, and persisted in the postsecondary program in the current grant reporting period.

(c) *Performance Measure 3: 1-Year Employment Retention.* The percentage of program completers who were employed for the first time as teachers of record in the preceding year by the partner high-need LEA or ECE program and were retained for the current school year.

(d) *Performance Measure 4: 3-Year Employment Retention.* The percentage of program completers who were employed by the partner high-need LEA or ECE program for three consecutive years after initial employment.

(e) *Performance Measure 5: Student Learning.* The percentage of grantees that report improved aggregate learning outcomes of students taught by new teachers. These data can be calculated using student growth, a teacher evaluation measure, or both.

Applicants must also address the evaluation requirements in section 204(a) of the HEA. This section asks applicants to develop objectives and measures for increasing:

(1) Achievement for all prospective and new teachers, as measured by the eligible partnership;

(2) Teacher retention in the first three years of a teacher's career;

(3) Improvement in the pass rates and scaled scores for initial State certification or licensure of teachers; and

(4) The percentage of teachers who meet the applicable State certification and licensure requirements, including any requirements for certification obtained through alternative routes to certification, or, with regard to special education teachers, the qualifications described in section 612(a)(14)(C) of the IDEA (20 U.S.C. 1412(a)(14)(C)), hired by the high-need LEA participating in the eligible partnership;

(5) The percentage of teachers who meet the applicable State certification and licensure requirements, including any requirements for certification obtained through alternative routes to certification, or, with regard to special education teachers, the qualifications described in section 612(a)(14)(C) of the IDEA (20 U.S.C. 1412(a)(14)(C)), hired by the high-need LEA who are members of underrepresented groups;

(6) The percentage of teachers who meet the applicable State certification and licensure requirements, including any requirements for certification obtained through alternative routes to certification, or, with regard to special education teachers, the qualifications described in section 612(a)(14)(C) of the IDEA (20 U.S.C. 1412(a)(14)(C)), hired by the high-need LEA who teach high-need academic subject areas (such as reading, mathematics, science, and foreign language, including less commonly taught languages and critical foreign languages);

(7) The percentage of teachers who meet the applicable State certification and licensure requirements, including any requirements for certification obtained through alternative routes to certification, or, with regard to special education teachers, the qualifications described in section 612(a)(14)(C) of the IDEA (20 U.S.C. 1412(a)(14)(C)), hired by the high-need LEA who teach in high-need areas (including special education, language instruction educational programs for limited English proficient students, and early childhood education);

(8) The percentage of teachers who meet the applicable State certification and licensure requirements, including any requirements for certification obtained through alternative routes to certification, or, with regard to special education teachers, the qualifications described in section 612(a)(14)(C) of the IDEA (20 U.S.C. 1412(a)(14)(C)), hired by the high-need LEA who teach in high-need schools, disaggregated by the elementary school and secondary school levels;

(9) As applicable, the percentage of early childhood education program classes in the geographic area served by the eligible partnership taught by early childhood educators who are highly competent; and

(10) As applicable, the percentage of teachers trained—

(i) To integrate technology effectively into curricula and instruction, including technology consistent with the principles of universal design for learning; and

(ii) To use technology effectively to collect, manage, and analyze data to improve teaching and learning for the purpose of improving student academic achievement.

Note: If funded, grantees will be asked to collect and report data on these measures in their project's annual performance reports (34 CFR 75.590). Applicants are also advised to consider these measures in conceptualizing the design, implementation, and evaluation of their proposed projects because of their importance in the application review process. Collection of data on these measures should be a part of the evaluation plan, along with measures of progress on goals and objectives that are specific to your project.

All grantees will be expected to submit an annual performance report documenting their success in addressing these performance measures.

5. *Continuation Awards:* In making a continuation award under 34 CFR 75.253, the Secretary considers, among other things: Whether a grantee has made substantial progress in achieving the goals and objectives of the project; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measurement requirements, the performance targets in the grantee's approved application.

In making a continuation award, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Mia Howerton, U.S. Department of Education, 400 Maryland Avenue SW., Room 4W205, Washington, DC 20202–5960. Telephone: (202) 205–0147 or by email: *Mia.Howerton@ed.gov* or *tqpartnership@ed.gov.*

If you use a TDD or a TTY, call the FRS, toll-free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or PDF. To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: May 18, 2016.

Nadya Chinoy Dabby,

Assistant Deputy Secretary for Innovation and Improvement.

[FR Doc. 2016–12101 Filed 5–20–16; 8:45 am]

BILLING CODE 4000–01–P

Election Assistance Commission

Notice of Sunshine Act Meeting

AGENCY: U.S. Election Assistance Commission.

ACTION: Notice of public meeting agenda.

DATE AND TIME: Wednesday, May 25, 2016, (9:00 a.m.–1:00 p.m.—EDT)

PLACE: 1335 East West Highway (First Floor Conference Room), Silver Spring, MD 20910.

AGENDA: Commissioners will meet to release a 2016 Election Worker Guidebook, State Compendium of Election Worker Requirements, and Election Worker Webisode. Commissioners will hear from state and local election officials, and research experts to: (1) Discuss ways to recruit and train election workers; and (2) discuss the allocation of resources at the polls on Election Day.

STATUS: This meeting will be open to the public.

PERSON TO CONTACT FOR INFORMATION: Bryan Whitener, Telephone: (301) 563–3961.

Signed:

Bryan Whitener,

Director of Communications and Clearinghouse, U.S. Election Assistance Commission.

[FR Doc. 2016–12177 Filed 5–19–16; 4:15 pm]

BILLING CODE 6820–KF–P

DEPARTMENT OF ENERGY

President's Council of Advisors on Science and Technology

AGENCY: Office of Science, Department of Energy.

ACTION: Notice of open teleconference.

SUMMARY: This notice sets forth the schedule and summary agenda for a conference call of the President's Council of Advisors on Science and Technology (PCAST), and describes the functions of the Council. The Federal Advisory Committee Act requires that public notice of these meetings be announced in the **Federal Register**.

DATES: June 6, 2016, 4:00 p.m. to 4:30 p.m.

ADDRESSES: To receive the call-in information, attendees should register for the conference call on the PCAST Web site, *http://www.whitehouse.gov/ostp/pcast* no later than 12:00 p.m. ET on Thursday, June 2, 2016.

FOR FURTHER INFORMATION CONTACT: Information regarding the meeting agenda, time, location, and how to register for the meeting is available on the PCAST Web site at: *http://whitehouse.gov/ostp/pcast.* Questions about the meeting should be directed to Ms. Jennifer Michael at *Jennifer_L_Michael@ostp.eop.gov,* (202) 456–4444.

SUPPLEMENTARY INFORMATION: The President's Council of Advisors on Science and Technology (PCAST) is an advisory group of the nation's leading scientists and engineers, appointed by the President to augment the science and technology advice available to him from inside the White House, cabinet departments, and other Federal agencies. See the Executive Order at *http://www.whitehouse.gov/ostp/pcast.* PCAST is consulted about and provides analyses and recommendations concerning a wide range of issues where understandings from the domains of science, technology, and innovation may bear on the policy choices before the President. PCAST is co-chaired by Dr. John P. Holdren, Assistant to the President for Science and Technology, and Director, Office of Science and Technology Policy, Executive Office of the President, The White House; and Dr. Eric S. Lander, President, Broad Institute of the Massachusetts Institute of Technology and Harvard.

Type of Meeting: Open.

Proposed Schedule and Agenda: The President's Council of Advisors on Science and Technology (PCAST) is scheduled to hold a public conference call on June 6, 2016 from 4:00 p.m. to 4:30 p.m.

Open Portion of Meeting: During this open meeting, PCAST is scheduled to discuss its study on Forensic Science in Federal Criminal Courts: Ensuring Reliable Principles and Methods. Additional information and the agenda, including any changes that arise, will be posted at the PCAST Web site at: *http://whitehouse.gov/ostp/pcast.*

Public Comments: It is the policy of the PCAST to accept written public comments of any length, and to accommodate oral public comments whenever possible. The PCAST expects that public statements presented at its meetings will not be repetitive of previously submitted oral or written statements.

The public comment period for this meeting will take place on June 6, 2016 at a time specified in the meeting agenda posted on the PCAST Web site at *http://whitehouse.gov/ostp/pcast.* This public comment period is designed only for substantive commentary on PCAST's work, not for business marketing purposes.

Oral Comments: To be considered for the public speaker list at the meeting, interested parties should register to speak at *http://whitehouse.gov/ostp/pcast,* no later than 12:00 p.m. Eastern Time on June 2, 2016. Phone or email reservations will not be accepted. To accommodate as many speakers as possible, the time for public comments will be limited to two (2) minutes per person, with a total public comment period of up to 10 minutes. If more speakers register than there is space available on the agenda, PCAST will randomly select speakers from among those who applied. Those not selected to present oral comments may always file written comments with the committee.

Written Comments: Although written comments are accepted continuously, written comments should be submitted to PCAST no later than 12:00 p.m. Eastern Time on June 2, 2016 so that the comments may be made available to the PCAST members prior to this meeting for their consideration. Information regarding how to submit comments and documents to PCAST is available at *http://whitehouse.gov/ostp/pcast* in the section entitled "Connect with PCAST."

Please note that because PCAST operates under the provisions of FACA, all public comments and/or presentations will be treated as public documents and will be made available for public inspection, including being posted on the PCAST Web site.

Meeting Accommodations: Individuals requiring special accommodation to access this public meeting should contact Ms. Jennifer Michael at least ten business days prior to the meeting so that appropriate arrangements can be made.

Issued in Washington, DC, on May 16, 2016.

LaTanya R. Butler,

Deputy Committee Management Officer.

[FR Doc. 2016–11959 Filed 5–20–16; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. OR16–18–000]

American Airlines, Inc. v. Plantation Pipe Line Company; Notice of Complaint

Take notice that on May 13, 2016, pursuant to Rule 206 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (Commission), 18 CFR 385.206, section 343.2 of the Commission's Rules Applicable to Oil Pipeline Proceedings, 18 CFR 343.2, American Airlines, Inc. (American or Complainant) filed a formal complaint against Plantation Pipe Line Company (Plantation or Respondent), alleging that Plantation unlawfully proposed to suspend jet fuel transportation service in violation of sections 1, 3, 6, 13, and 15 of the Interstate Commerce Act, 49 U.S.C. app. 1, 3, 6, 13, and 15 (1988) and that its transmix policy is unduly discriminatory and unduly preferential, all as more fully explained in the complaint.

American certifies that copies of the complaint were served on the contacts for Plantation as listed on the Commission's list of Corporate Officials.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. This filing is accessible on-line at *http://www.ferc.gov,* using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on June 13, 2016.

Dated: May 17, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–12064 Filed 5–20–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14773–000]

Swanton Hydro, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On April 1, 2016, Swanton Hydro, LLC (Swanton Hydro) filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Lower Swanton Dam Hydroelectric Project (project) to be located on the Missisquoi River in the Village of Swanton, Franklin County, Vermont. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of: (1) An existing 335-foot-long, 12-foot-high concrete gravity dam (Swanton dam) with a 331-foot-long spillway with 2-foot-high wooden flashboards; (2) an existing 170-acre impoundment with a normal water surface elevation of 112 feet above mean sea level; (3) a new 35-foot-long, 55-foot-wide intake structure with trashracks; (4) a new 100-foot-long, 55-foot-wide, 25-foot-high powerhouse containing two turbine-generator units with a total installed capacity of 850 kilowatts; (5) a new 45-foot-long, 45-foot-wide, 18-foot-deep tailrace and 50-foot-long training wall; (6) a new 210-foot-long, 12.47-kilovolt transmission line and transformer; and (7) appurtenant facilities. The project would produce an estimated average annual generation of 3,580 megawatt-hours. There are no federal lands associated with the project.

Applicant Contact: William F. Scully, P.O. Box 338, North Bennington, Vermont 05257; phone: (802) 379–2469.

FERC Contact: Tom Dean (202) 502–6041.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, notices of intent, and competing applications using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. The first page of any filing should include docket number P–14773–000.

More information about this project, including a copy of the application, can be viewed or printed on the "eLibrary" link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–14773) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: May 17, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–12065 Filed 5–20–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER16–533–001.

Applicants: Midcontinent Independent System Operator, Inc.

Description: Compliance filing: 2016–05–17 CTS Compliance Filing to be effective 3/1/2017.

Filed Date: 5/17/16.

Accession Number: 20160517–5157.

Comments Due: 5 p.m. ET 6/7/16.

Docket Numbers: ER16–534–001.

Applicants: Midcontinent Independent System Operator, Inc.

Description: Compliance filing: 2016–05–17_CTS Compliance Filing to be effective 3/1/2017.

Filed Date: 5/17/16.

Accession Number: 20160517–5159.

Comments Due: 5 p.m. ET 6/7/16.

Docket Numbers: ER16–1410–001.

Applicants: Torofino Trading LLC.

Description: Tariff Amendment: Supplement to the Application for Market-Based Rate Authority to be effective 5/31/2016.

Filed Date: 5/17/16.

Accession Number: 20160517–5131.

Comments Due: 5 p.m. ET 6/7/16.

Docket Numbers: ER16–1440–001.

Applicants: Roswell Solar, LLC.

Description: Tariff Amendment: Roswell Solar, LLC's Amendment to Application for Market-Based Rates to be effective 6/15/2016.

Filed Date: 5/17/16.

Accession Number: 20160517–5099.

Comments Due: 5 p.m. ET 6/7/16.

Docket Numbers: ER16–1719–000.

Applicants: San Diego Gas & Electric Company.

Description: § 205(d) Rate Filing: SDGE Annual Filing of Revised Costs and Accruals for PBOPs to be effective 1/1/2017.

Filed Date: 5/17/16.

Accession Number: 20160517–5096.

Comments Due: 5 p.m. ET 6/7/16.

Docket Numbers: ER16–1720–000.

Applicants: Invenergy Energy Management LLC.

Description: Baseline eTariff Filing: Application for Market-Based Rate Authorization to be effective 7/1/2016.

Filed Date: 5/17/16.

Accession Number: 20160517–5105.

Comments Due: 5 p.m. ET 6/7/16.

Docket Numbers: ER16–1720–001.

Applicants: Invenergy Energy Management LLC.

Description: Tariff Amendment: Supplement to May 17, 2016 Market-Based Rate Application to be effective 7/1/2016.

Filed Date: 5/17/16.

Accession Number: 20160517–5139.

Comments Due: 5 p.m. ET 6/7/16.

Docket Numbers: ER16–1721–000.

Applicants: Public Service Company of New Mexico.

Description: Initial rate filing: Transmission Construction and Interconnection Agreement with Tri-State to be effective 4/28/2016.

Filed Date: 5/17/16.

Accession Number: 20160517–5116.

Comments Due: 5 p.m. ET 6/7/16.

Docket Numbers: ER16–1722–000.

Applicants: ISO New England Inc., Fitchburg Gas and Electric Light Company.

Description: § 205(d) Rate Filing: Fitchburg Gas and Electric Light Company Request for Updated Depreciation Rates to be effective 5/1/2016.

Filed Date: 5/17/16.

Accession Number: 20160517–5130.

Comments Due: 5 p.m. ET 6/7/16.

Docket Numbers: ER16–1723–000.

Applicants: Southwestern Electric Power Company.

Description: § 205(d) Rate Filing: AECC East Fayetteville Delivery Point Agreement to be effective 4/21/2016.

Filed Date: 5/17/16.

Accession Number: 20160517–5140.

Comments Due: 5 p.m. ET 6/7/16.

Docket Numbers: ER16–1724–000.

Applicants: Paulding Wind Farm III LLC.

Description: Baseline eTariff Filing: MBR Application to be effective 7/17/2016.

Filed Date: 5/17/16.

Accession Number: 20160517–5158.

Comments Due: 5 p.m. ET 6/7/16.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: May 17, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–12046 Filed 5–20–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Commission Staff Attendance

The Federal Energy Regulatory Commission hereby gives notice that members of the Commission's staff will attend the following meeting related to the Midcontinent Independent System Operator, Inc. (MISO)—PJM Interconnection, L.L.C. (PJM) Joint and Common Market Initiative (Docket No. AD14–3–000): MISO/PJM Joint Stakeholder Meeting—May 24, 2016.

The above-referenced meeting will be held at: MISO Stakeholder Center, 720 City Center Drive, Carmel, IN 46032.

The above-referenced meeting is open to the public.

Further information may be found at *www.pjm.com.*

The discussions at the meeting described above may address matters at issue in the following proceedings:

Docket Nos. ER16–533, ER16–534, Midcontinent Independent System Operator, Inc.

Docket Nos. ER16–535, ER16–536, PJM Interconnection, L.L.C.

Docket No. EL13–88, Northern Indiana Public Service Company v. Midcontinent Independent System Operator, Inc. and PJM Interconnection, L.L.C.

Docket No. ER11–1844, Midwest Independent Transmission System Operator, Inc.

Docket No. ER10–1791, Midwest Independent Transmission System Operator, Inc.

Docket Nos. ER13–1924, ER13–1926, ER13–1936, ER13–1944, ER13–1947, ER15–2200, PJM Interconnection, L.L.C.

Docket No. ER14–1736, Midcontinent Independent System Operator, Inc.

Docket No ER16–1485, Midcontinent Independent System Operator, Inc.

Docket No ER16–1486, PJM Interconnection, L.L.C.

Docket Nos. EL15–99, EL16–12, Internal MISO Generation v. Midcontinent Independent System Operator, Inc.

For more information, contact Bahaa Seireg, Office of Energy Policy and Innovation, Federal Energy Regulatory Commission at (202) 502–8739 or *Bahaa.Seireg@ferc.gov.*

Dated: May 17, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–12063 Filed 5–20–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP16–3–000 and CP16–3–001]

Texas Eastern Transmission, LP; Supplemental Notice of Intent To Prepare an Environmental Assessment for the Proposed Access South, Adair Southwest, and Lebanon Extension Projects and Request for Comments on Environmental Issues

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the Access South, Adair Southwest, and Lebanon Extension Projects (Projects) in Docket Nos. CP16–3–000 and CP16–3–001. The Projects involve construction, abandonment, and operation of facilities by Texas Eastern Transmission, LP (Texas Eastern) that would enable an additional 622,000 dekatherms per day of natural gas transportation on Texas Eastern's existing mainline facilities to serve markets in the Midwest and Southeast. The Commission will use this EA in its decision-making process to determine whether the project is in the public convenience and necessity.

This notice announces the opening of a second scoping period that the Commission will use to gather input from the public on the Projects. The Commission is opening a second scoping period for affected landowners who were not included in the mailing list for the original Notice of Intent (NOI) issued for the Projects on August 1, 2015 during the pre-filing review process under Docket Number PF15–17–000. This includes landowners near twelve existing compressor stations where Texas Eastern proposes to replace pipeline or modify facilities to allow for reverse flow capabilities, including one compressor station where it proposes to install additional compression facilities. Texas Eastern's proposal is more fully described on page 3 of this notice.

You can make a difference by providing us with your specific comments or concerns about the Projects. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. Your input will help the Commission staff determine what issues they need to evaluate in the EA. To ensure that your comments are timely and properly recorded, please send your comments so that the Commission receives them in Washington, DC on or before June 16, 2016.

Landowners receiving this notice are primarily abutters to Texas Eastern's existing compressor stations where modifications are proposed or are within 0.5 mile of the Tompkinsville Compressor Station in Monroe County, Kentucky, where additional compression is proposed. One landowner receiving this notice is directly affected by the proposed replacement pipeline at Kosciusko Compressor Station in Attala County, Mississippi, and Texas Eastern has stated it has contacted this landowner. The company will seek to negotiate a mutually acceptable agreement regarding acquisition of any easements needed to construct, operate, and maintain the replacement pipeline. However, if the Commission approves the Projects, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement, the pipeline company could initiate condemnation proceedings where compensation would be determined in accordance with state law.

A fact sheet prepared by the FERC entitled "An Interstate Natural Gas Facility On My Land? What Do I Need To Know?" is available for viewing on the FERC Web site (*www.ferc.gov*). This fact sheet addresses a number of typically asked questions, including the use of eminent domain and how to participate in the Commission's proceedings.

Public Participation

For your convenience, there are three methods you can use to submit your comments to the Commission. The Commission encourages electronic filing of comments and has expert staff available to assist you at (202) 502–8258 or *efiling@ferc.gov.* Please carefully follow these instructions so that your comments are properly recorded.

(1) You can file your comments electronically using the *eComment* feature on the Commission's Web site (*www.ferc.gov*) under the link to *Documents and Filings.* This is an easy method for submitting brief, text-only comments on a project;

(2) You can file your comments electronically by using the *eFiling* feature on the Commission's Web site (*www.ferc.gov*) under the link to *Documents and Filings.* With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on "*eRegister.*" If you are filing a comment on a particular project, please select "Comment on a Filing" as the filing type; or

(3) You can file a paper copy of your comments by mailing them to the following address. Be sure to reference the project docket numbers (CP16–3–000 and CP16–3–001) with your submission: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Room 1A, Washington, DC 20426.

Summary of the Proposed Project

The proposed pipeline facilities for the Projects include 15.8 miles of 36-inch-diameter pipeline loop[1] in three segments, most of which would be either within or adjacent to Texas Eastern's existing rights-of-way in Athens, Meigs, Noble, and Monroe Counties, Ohio; and 0.5 mile of 16-inch-diameter replacement pipeline within an existing right-of-way in Attala County, Mississippi. In addition two pig[2] launcher/receivers would be relocated and two new pig launcher/receivers would be installed in Monroe County, Ohio. Proposed modifications to aboveground facilities would include modifications necessary to allow for bi-directional flow and meter reversals at twelve existing compressor stations which are proposed to be located primarily within Texas Eastern's current footprint. In addition, a new 16,875 horsepower electric compressor would be added at the Tompkinsville Compressor Station in Monroe County, Kentucky.

The proposed modifications at twelve existing compressor station sites would include piping modifications to accommodate bi-directional flow capability along Texas Eastern's existing mainline. These modifications are proposed at the following compressor stations:

- Holbrook Compressor Station in Greene County, Pennsylvania;
- Lebanon Compressor Station in Warren County, Ohio;
- Somerset Compressor Station in Perry County, Ohio;
- Berne Compressor Station in Monroe County, Ohio;
- Athens Compressor Station in Athens County, Ohio;
- Owingsville Compressor Station in Bath County, Kentucky;
- Danville Compressor Station in Lincoln County, Kentucky;
- Tompkinsville Compressor Station in Monroe County, Kentucky;
- Gladeville Compressor Station in Wilson County, Tennessee;

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[1] A pipeline loop is a segment of pipe constructed parallel to an existing pipeline to increase capacity.

[2] A "pig" is a tool that the pipeline company inserts into and pushes through the pipeline for cleaning the pipeline, conducting internal inspections, or other purposes.

- Barton Compressor Station in Colbert County, Alabama;
- Egypt Compressor Station in Monroe County, Mississippi; and
- Kosciusko Compressor Station in Attala County, Mississippi.

The general location of the Projects facilities is shown in appendix 1.[3]

Land Requirements for Construction

Construction of the proposed facilities would disturb about 283.7 acres of land for the pipeline loops and replacement, including extra workspace and access roads, and 341.0 acres of previously disturbed land at compressor station facilities. Following construction, Texas Eastern would maintain an additional 96.8 acres for permanent operation of the Projects' facilities; the remaining acreage would be restored and revert to former uses. The proposed loops would be located mostly adjacent to Texas Eastern's existing pipeline rights-of-way and construction at the compressor stations would occur at existing facilities where no permanent expansion of the facilities would occur.

The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us[4] to discover and address concerns the public may have about proposals. This process is referred to as scoping. The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this notice, the Commission requests public comments on the scope of the issues to address in the EA. We will consider all filed comments during the preparation of the EA.

In the EA we will discuss impacts that could occur as a result of the construction and operation of the proposed Projects under these general headings:

- Geology and soils;
- Land use;
- water resources, fisheries, and wetlands;
- cultural resources;
- vegetation and wildlife;
- air quality and noise;
- endangered and threatened species;
- public safety; and
- cumulative impacts.

We will also evaluate possible alternatives to the proposed Projects or portions of the Projects, and make recommendations on how to lessen or avoid impacts on the various resource areas.

The EA will present our independent analysis of the issues. The EA will be available in the public record through eLibrary. Depending on the comments received during the scoping process, we may also publish and distribute the EA to the public for an allotted comment period. We will consider all comments on the EA before we make our recommendations to the Commission. To ensure we have the opportunity to consider and address your comments, please carefully follow the instructions in the Public Participation section, beginning on page 2.

Consultations Under Section 106 of the National Historic Preservation Act

In accordance with the Advisory Council on Historic Preservation's implementing regulations for section 106 of the National Historic Preservation Act, we have initiated consultation with the applicable State Historic Preservation Offices, and to solicit their views and those of other government agencies, interested Indian tribes, and the public on the Projects' potential effects on historic properties.[5] We will define the project-specific Area of Potential Effects (APE) in consultation with the SHPOs as the Projects develop. On natural gas facility projects, the APE at a minimum encompasses all areas subject to ground disturbance (examples include construction right-of-way, contractor/pipe storage yards, compressor stations, and access roads). Our EA for the Projects will document our findings on the impacts on historic properties and summarize the status of consultations under section 106.

Environmental Mailing List

The environmental mailing list for the Projects includes federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American Tribes; and local libraries and newspapers. This list also includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within certain distances of aboveground facilities, and anyone who submits comments on the Projects. The mailing list for this supplemental NOI just includes landowners who were not previously notified by the original NOI and are abutters to Texas Eastern's compressor stations or within 0.5 mile of the Tompkinsville Compressor Station in Monroe County, Kentucky where additional compression is proposed. We will update the environmental mailing list as the analysis proceeds to ensure that we send the information related to this environmental review to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed Projects.

If we publish and distribute the EA, copies of the EA will be sent to the environmental mailing list for public review and comment. If you would prefer to receive a paper copy of the document instead of the CD version or would like to remove your name from the mailing list, please return the attached Information Request (appendix 2).

Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an "intervenor" which is an official party to the Commission's proceeding. Intervenors play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in the proceeding by filing a request to intervene. Motions to intervene are more fully described at *http://www.ferc.gov/resources/guides/how-to/intervene.asp*. Instructions for becoming an intervenor are in the "Document-less Intervention Guide" under the "e-filing" link on the Commission's Web site. Because you were not notified by the original NOI, you may still intervene.

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC Web site (*www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on "General Search" and enter the docket number, excluding the last three digits in the Docket Number field (*i.e.*, CP16–

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[3] The appendices referenced in this notice will not appear in the **Federal Register**. Copies of the appendices were sent to all those receiving this notice in the mail and are available at *www.ferc.gov* using the link called "eLibrary" or from the Commission's Public Reference Room, 888 First Street NE., Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary, refer to the last page of this notice.

[4] "We," "us," and "our" refer to the environmental staff of the Commission's Office of Energy Projects.

[5] The Advisory Council on Historic Preservation regulations are at Title 36, Code of Federal Regulations, Part 800. Those regulations define historic properties as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places.

3). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *www.ferc.gov/docs-filing/esubscription.asp.*

Finally, public meetings or site visits will be posted on the Commission's calendar located at *www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

Dated: May 17, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–12062 Filed 5–20–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Schedule for Environmental Review of the Nexus Gas Transmission and Texas Eastern Appalachian Lease Projects

	Docket Nos.
NEXUS Gas Transmission, LLC.	CP16–22–000
Texas Eastern Transmission, LP.	CP16–23–000

On November 20, 2015, NEXUS Gas Transmission, LLC (NEXUS) and Texas Eastern Transmission, LP (Texas Eastern) filed applications in Docket Nos. CP16–22–000 and CP16–23–000 requesting a Certificate of Public Convenience and Necessity pursuant to Section 7(c) of the Natural Gas Act to construct, operate, and maintain certain natural gas pipeline facilities. The proposed projects are known as the NEXUS Gas Transmission (NGT) Project and Texas Eastern Appalachian Lease (TEAL) Project (jointly referred to as "Projects") and would provide transportation of 1.5 million dekatherms per day of Appalachian Basin shale gas to consuming markets in Northern Ohio, Southeastern Michigan, and Midwestern markets, as well as the Dawn Hub in Ontario, Canada.

On December 7, 2015, the Federal Energy Regulatory Commission (FERC or Commission) issued its Notice of Application for the Projects. Among other things, that notice alerted other agencies issuing federal authorizations of the requirement to complete all necessary reviews and to reach a final decision on the request for a federal authorization within 90 days of the date of issuance of the Commission staff's final Environmental Impact Statement (EIS) for the Projects. This instant notice identifies the FERC staff's planned schedule for completion of the final EIS for the Projects, which is based on an issuance of the draft EIS in July 2016.

Schedule for Environmental Review

Issuance of Notice of Availability of the final EIS—November 30, 2016

90-day Federal Authorization Decision Deadline—February 28, 2017

If a schedule change becomes necessary for the final EIS, an additional notice will be provided so that the relevant agencies are kept informed of the Projects' progress.

Project Description

The NGT Project would include about 255 miles of new 36-inch-diameter mainline pipeline, including about 208 miles in Columbiana, Stark, Summit, Wayne, Medina, Lorain, Huron, Erie, Sandusky, Wood, Lucas, Henry, and Fulton Counties, Ohio and about 47 miles in Lenawee, Monroe, Washtenaw, and Wayne Counties, Michigan. The NGT Project also would include about one mile of new 36-inch-diameter interconnecting pipeline in Columbiana County, Ohio. In addition, NEXUS proposes to construct and operate four new compressor stations and other aboveground facilities.

The TEAL Project would include about 4.4 miles of new 36-inch-diameter loop pipeline in Monroe County, Ohio; and about 0.3 mile of new 30-inch-diameter interconnecting pipeline between in Columbiana County, Ohio. The TEAL Project also would include construction of one new compressor station, modification of one existing compressor station, and construction and modification of other aboveground facilities.

Background

On January 9, 2015 and January 26, 2015, the Commission staff granted NEXUS and Texas Eastern's requests to use the FERC's Pre-filing environmental review process and assigned the NGT Project and TEAL Project Docket Nos. PF15–10–000 and PF15–11–000, respectively. On April 8, 2015, the Commission issued a *Notice of Intent to Prepare an Environmental Impact Statement for the Planned Nexus Gas Transmission Project and Texas Eastern Appalachian Lease Project, Request for Comments on Environmental Issues, and Notice of Public Scoping Meetings* (NOI).

The NOI was issued during the pre-filing review of the Projects and was sent to federal, state, and local government agencies; elected officials; affected landowners; environmental and public interest groups; Native American tribes and regional organizations; commentors and other interested parties; and local libraries and newspapers. Major issues raised during scoping include underground mines, karst geology, topsoil, drain tiles, drinking water, waterbodies, wetlands, vegetation, wildlife, threatened and endangered species, Oak Openings ecosystem, residential development, socioeconomic resources, cultural resources, public safety, air quality, as well as potential cumulative resource impacts and recommended project alternatives.

The U.S. Fish and Wildlife Service and U.S. Environmental Protection Agency are cooperating agencies in the preparation of the EIS.

Additional Information

In order to receive notification of the issuance of the EIS and to keep track of all formal issuances and submittals in specific dockets, the Commission offers a free service called eSubscription (*http://www.ferc.gov/docs-filing/esubscription.asp*). Additional information about the Project is available from the Commission's Office of External Affairs at (866) 208–FERC or on the FERC Web site (*www.ferc.gov*). Using the "eLibrary" link, select "General Search" from the eLibrary menu, enter the selected date range and "Docket Number" excluding the last three digits (*i.e.,* CP16–22 or CP16–23), and follow the instructions.

Dated: May 17, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–12047 Filed 5–20–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG16–100–000.
Applicants: Chisholm View Wind Project II, LLC.
Description: Notice of Self-Certification of Chisholm View Wind Project II, LLC.
Filed Date: 5/16/16.
Accession Number: 20160516–5323.
Comments Due: 5 p.m. ET 6/6/16.

Docket Numbers: EG16–101–000.
Applicants: Drift Sand Wind Project, LLC.
Description: Notice of Self-Certification of Drift Sand Wind Project, LLC.
Filed Date: 5/16/16.
Accession Number: 20160516–5393.
Comments Due: 5 p.m. ET 6/6/16.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1906–007; ER11–2192–009; ER10–1971–027; ER11–4462–018.
Applicants: FPL Energy New Mexico Wind, LLC, Red Mesa Wind, LLC, NextEra Energy Power Marketing, LLC, NEPM II, LLC.
Description: Notice of Change in Status of the NextEra Companies, et al.
Filed Date: 5/16/16.
Accession Number: 20160516–5405.
Comments Due: 5 p.m. ET 6/6/16.

Docket Numbers: ER11–2724–004.
Applicants: Black Hills Colorado IPP, LLC.
Description: Notice of Change in Status of Black Hills Colorado IPP, LLC.
Filed Date: 5/16/16.
Accession Number: 20160516–5404.
Comments Due: 5 p.m. ET 6/6/16.

Docket Numbers: ER16–1398–002.
Applicants: Provision Power & Gas, LLC.
Description: Supplement to May 10, 2016 Provision Power & Gas, LLC tariff filing.
Filed Date: 5/10/16.
Accession Number: 20160510–5110.
Comments Due: 5 p.m. ET 5/31/16.

Docket Numbers: ER16–1714–000.
Applicants: BTG Pactual Commodities (US) LLC.
Description: § 205(d) Rate Filing: Notice of Succession to be effective 5/16/2016.
Filed Date: 5/16/16.
Accession Number: 20160516–5340.
Comments Due: 5 p.m. ET 6/6/16.

Docket Numbers: ER16–1715–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 3163 Basin Electric and MidAmerican Energy Attachment AO to be effective 10/1/2015.
Filed Date: 5/16/16.
Accession Number: 20160516–5341.
Comments Due: 5 p.m. ET 6/6/16.

Docket Numbers: ER16–1716–000.
Applicants: Michigan Electric Transmission Company, LLC.
Description: § 205(d) Rate Filing: Filing of a Certificate of Concurrence to be effective 5/5/2016.
Filed Date: 5/16/16.
Accession Number: 20160516–5358.
Comments Due: 5 p.m. ET 6/6/16.

Docket Numbers: ER16–1717–000.
Applicants: Midcontinent Independent System Operator, Inc., Entergy Services, Inc.
Description: § 205(d) Rate Filing: 2016–05–17_RS 38 Cancellation of RS 38 EGSL–ENOI Amended JPZ Agreement to be effective 8/31/2016.
Filed Date: 5/17/16.
Accession Number: 20160517–5065.
Comments Due: 5 p.m. ET 6/7/16.

Docket Numbers: ER16–1718–000.
Applicants: Tesoro Refining & Marketing Company LLC.
Description: Market-Based Triennial Review Filing: Tesoro Refinings Triennial Review Filing to be effective N/A.
Filed Date: 7/18/16.
Accession Number: 20160517–5071.
Comments Due: 5 p.m. ET 6/7/16.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf*. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: May 17, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–12045 Filed 5–20–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM98–1–000]

Records Governing Off-the-Record Communications; Public Notice

This constitutes notice, in accordance with 18 CFR 385.2201(b), of the receipt of prohibited and exempt off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive a prohibited or exempt off-the-record communication relevant to the merits of a contested proceeding, to deliver to the Secretary of the Commission, a copy of the communication, if written, or a summary of the substance of any oral communication.

Prohibited communications are included in a public, non-decisional file associated with, but not a part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any responses thereto should become a part of the decisional record, the prohibited off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to respond to any facts or contentions made in a prohibited off-the-record communication, and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such a request only when it determines that fairness so requires. Any person identified below as having made a prohibited off-the-record communication shall serve the document on all parties listed on the official service list for the applicable proceeding in accordance with Rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications are included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR 385.2201(e)(1)(v).

The following is a list of off-the-record communications recently received by the Secretary of the Commission. The communications listed are grouped by docket numbers in ascending order. These filings are available for electronic review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary link.

Enter the docket number, excluding the last three digits, in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Docket No.	File date	Presenter or requester
Prohibited:		
1. CP13–483–000	5–2–2016	Thomas C. Tucker.
2. CP15–514–000	5–2–2016	Ohio Oil & Gas Association.
3. CP13–483–000, CP13–492–000	5–6–2016	American Petroleum Institute.
4. CP13–483–000, CP13–492–000	5–6–2016	Black Hills Exploration & Production.
5. CP11–161–000	5–6–2016	Greg Lotorto.
6. CP16–21–000	5–9–2016	John Puffer.
7. CP16–21–000	5–9–2016	Karen Miller.
8. CP16–21–000	5–10–2016	Mass Mailing.[1]
9. CP16–21–000	5–10–2016	Mass Mailing.[2]
10. CP16–21–000	5–10–2016	Mass Mailing.[3]
11. CP16–21–000	5–11–2016	Charlote Forddman.
12. CP15–554–000, CP15–554–001	5–11–2016	William Limpert.
Exempt:		
1. P–10482–000	5–2–2016	U.S. House Representative Ron Kind.
2. CP15–558–000	5–2–2016	State of New Jersey Assemblyman Erik Peterson.
3. CP15–514–000	5–2–2016	State of Ohio House Representative Ron Hood.
4. P–13755–000, P–13757–000, P–13761–000, P–13768–000.	5–4–2016	U.S. Senator Robert P. Casey, Jr.
5. CP15–514–000	5–5–2016	State of Ohio House Representative Tim Schaffer.
6. CP16–21–000	5–5–2016	Town of Temple, New Hampshire Office of the Selectman.[4]
7. CP16–21–000	5–10–2016	U.S. House Representative Anne McLane Kuster.
8. CP16–21–000	5–10–2016	U.S. Senator Kelly A. Ayotte.
9. CP15–514–000	5–10–2016	State of Ohio Senator William Seitz.
10. CP16–21–000	5–11–2016	Town of Milford, New Hampshire Town Administrator Mark Bender.

[1] 9 letters have been sent to FERC Commissioners and staff under this docket number.

[2] 6 letters have been sent to FERC Commissioners and staff under this docket number.

[3] 6 letters have been sent to FERC Commissioners and staff under this docket number.

[4] Chairman George Willard, Selectman Ken Caisse, Selectman Gail Cromwell.

Dated: May 17, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–12044 Filed 5–20–16; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2006–0894; FRL–9946–71–OAR]

Proposed Information Collection Request; Comment Request; Registration of Fuels and Fuel Additives—Requirements for Manufacturers

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is planning to submit an information collection request (ICR) "Registration of Fuels and Fuel Additives—Requirements for Manufacturers" (EPA ICR No. 0309.15, OMB Control No. 2060–0150) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*). Before doing so, EPA is soliciting public comments on specific aspects of the proposed information collection as described below. This is a proposed extension of the ICR, which is currently approved through October 31, 2016. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Comments must be submitted on or before July 22, 2016.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OAR–2006–0894, online using *www.regulations.gov* (our preferred method), by email to *a-and-r-docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460. EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: James W. Caldwell, Compliance Division, Office of Transportation and Air Quality, Mail Code 6405A, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: (202) 343–9303; fax number: (202) 343–2800; email address: *caldwell.jim@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents which explain in detail the information that EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Pursuant to section 3506(c)(2)(A) of the PRA, EPA is soliciting comments and information to enable it to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, EPA will issue another **Federal Register** notice to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

Abstract: In accordance with the regulations at 40 CFR part 79, subparts A, B, C, and D, Registration of Fuels and Fuel Additives, manufacturers (including importers) of motor-vehicle gasoline, motor-vehicle diesel fuel, and additives to those fuels, are required to have these products registered by EPA prior to their introduction into commerce. Registration involves providing a chemical description of the fuel or additive, and certain technical, marketing, and health-effects information. The development of health-effects data, as required by 40 CFR part 79, subpart F, is covered by a separate information collection (EPA ICR No. 1696.08, OMB Control No. 2060–0297). Manufacturers are also required to submit periodic reports (annually for additives, quarterly and annually for fuels) on production volume and related information. The information is used to identify products whose evaporative or combustion emissions may pose an unreasonable risk to public health, thus meriting further investigation and potential regulation. The information is also used to ensure that fuel additives comply with EPA requirements for protecting catalytic converters and other automotive emission controls. The data have been used to construct a comprehensive data base on fuel and additive composition. The Mine Safety and Health Administration of the Department of Labor restricts the use of diesel additives in underground coal mines to those registered by EPA. Most of the information has been claimed by the manufacturers as CBI.

Form Numbers: EPA Forms 3520–12, 3520–12A, 3520–12Q, 3520–13, 3520–13A, and 3520–13B.

Respondents/Affected Entities: Manufacturers and importers of motor-vehicle gasoline, motor-vehicle diesel fuel, and additives to those fuels.

Respondents Obligation to Respond: Mandatory per 40 CFR part 79.

Estimated Number of Respondents: 1950.

Frequency of Response: On occasion, quarterly, annually.

Total Estimated Burden: 21,000 hours per year. Burden is defined at 5 CFR 1320.03(b).

Total Estimated Cost: $1.9 million per year, includes $50,000 annualized capital or operation & maintenance costs.

Changes in Estimates: There is an increase of 400 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This increase is due to an increase in the number of registered fuels and fuel additives for which periodic reports are required.

Dated: May 16, 2016.

Byron J. Bunker,

Director, Compliance Division, Office of Transportation and Air Quality, Office of Air and Radiation.

[FR Doc. 2016–12105 Filed 5–20–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2016–0178; FRL–9946–57–OW]

Proposed Information Collection Request; Comment Request; EPA Application Materials for the Water Infrastructure Finance and Innovation Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency is planning to submit an information collection request, EPA Application Materials for the Water Infrastructure Finance and Innovation Act (EPA ICR no. 2549.01, OMB Control No. 2040–NEW) to the Office of Management and Budget for review and approval in accordance with the Paperwork Reduction Act. Before doing so, EPA is soliciting public comments on specific aspects of the proposed information collection as described below. This is a request for approval of a new collection. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Comments must be submitted on or before July 22, 2016.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OW–2016–0178, online using *www.regulations.gov* (our preferred method), or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460.

EPA's policy is that all comments received will be included in the public docket without change, including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Karen Fligger, Municipal Support Division, Office of Wastewater Management, 4201–T, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: (202) 564–2992; fax number: (202) 501–2346; email address: *fligger.karen@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents which explain in detail the information the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The telephone number for the Docket Center is (202) 566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Pursuant to section 3506(c)(2)(A) of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), EPA is soliciting comments and information to enable it to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, EPA will issue another **Federal Register** notice to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

Abstract: The collection of information is necessary in order to receive applications for credit assistance pursuant to section 5024 of the Water Infrastructure Finance and Innovation Act (WIFIA) of 2014, 33 U.S.C 3903. The purpose of the WIFIA program is to provide Federal credit assistance in the form of direct loans and loan guarantees to eligible clean water and drinking water projects.

WIFIA requires that an eligible entity submit to the Administrator an application at such time, in such manner, and containing such information, as the Secretary or the Administrator *may require* to receive assistance under WIFIA. In order to satisfy these requirements, EPA must collect an application from applicants seeking funding. The Letters of Interest and Applications collected from loan applicants through this solicitation will be used by EPA, the WIFIA program office, and an evaluation team to evaluate applications for credit assistance under the WIFIA eligibility requirements and selection criteria.

Form Numbers: None.

Respondents/Affected Entities: The Letters of Interest and Applications collected from loan applicants through this solicitation will be used by EPA to evaluate requests for credit assistance under the WIFIA eligibility requirements and selection criteria.

Respondent's Obligation to Respond: Required to obtain credit assistance pursuant to section 5024 of WIFIA, 33 U.S.C. 3903.

Estimated Number of Respondents: 25 per year (total).

Frequency of Response: one per respondent.

Total Estimated Burden: 1,500 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total Estimated Cost: $1,489,594 (per year), includes no annualized capital or operation and maintenance costs.

Dated: May 12, 2016.

Andrew D. Sawyers,

Director, Office of Wastewater Management.

[FR Doc. 2016–12106 Filed 5–20–16; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL MARITIME COMMISSION

[Petition No. P1–16]

Petition of COSCO Container Lines Company Limited for an Exemption From Commission Regulations; Notice of Filing of Request for Extension of Time

This is to provide notice of filing and to invite comments on or before May 27, 2016, with regard to a requested extension of time for an exemption previously granted as described below.

On January 15, 2016, COSCO Container Lines Company Limited ("COSCON") (Petitioner), petitioned the Commission pursuant to 46 CFR 502.76 of the Commission's Rules of Practice and Procedure, for an exemption from the Commission's rules requiring individual service contract amendments, 46 CFR 530.10. Petitioner explained that "[o]n or about March 1, 2016, COSCON will acquire by time charter the containerships and certain other assets of China Shipping Container Lines Co. ("China Shipping")" and, as such, requested that the Commission permit the submission of a "universal notice to the Commission and to the service contract parties" instead of filing an amendment for each of the seven hundred (700) service contracts that will be assigned to COSCON. In addition COSCON proposed to send electronic notice to each shipper counter party. Because China Shipping tariffs would be taken over by COSCON and renumbered and republished, COSCON also sought a waiver to avoid amending each contract with the new tariff number, by publishing a notice of the change in the existing China Shipping and COSCON tariffs. Notice of the Petition appeared in the **Federal Register** on January 27, 2016, 81 FR 4627.

The Commission granted the Petition by Order on February 29, 2016 and ordered that the new COSCON tariff remain in effect only until June 1, 2016 noting that "most of the relevant service contracts will expire on or before April 30, 2016, rendering the new tariffs unnecessary after that date." On May 13, 2016, COSCON filed a Petition for extension of the exemption stating that "there remains a very limited number of shippers (around 30), as to which the discussions have taken longer than COSCON anticipated," and so requests a continuation of the exemption to July 31, 2016.

The Petition and related documents are posted on the Commission's Web site at *http://www.fmc.gov/p1-16.* Comments filed in response to this Petition will be posted on the Commission's Web site at this location.

In order for the Commission to make a thorough evaluation of the Petition requesting extension of the exemption, interested persons are requested to submit views or arguments in reply to the Petition for Extension of Exemption no later than May 27, 2016. Commenters must send an original and 5 copies to the Secretary, Federal Maritime Commission, 800 North Capitol Street NW., Washington, DC 20573–0001, and be served on Petitioner's counsel, Robert B. Yoshitomi, or Eric C. Jeffrey, Nixon Peabody LLP, 799 9th Street NW., Washington, DC 20001. A PDF copy of the reply must also be sent as an attachment to *Secretary@fmc.gov.* Include in the email subject line "Petition No P1–16."

Karen V. Gregory,

Secretary.

[FR Doc. 2016–12020 Filed 5–20–16; 8:45 am]

BILLING CODE 6731–AA–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0077; Docket 2016–0053; Sequence 13]

Submission for OMB Review; Quality Assurance Requirements

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for public comments regarding an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act, Regulatory Secretariat Division will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement concerning quality assurance requirements.

DATES: Submit comments on or before June 22, 2016.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for GSA, Room 10236, NEOB, Washington, DC 20503.

Additionally submit a copy to GSA by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching the OMB control number. Select the link "Submit a Comment" that corresponds with "Information Collection 9000–0077, Quality Assurance Requirements". Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "Information Collection 9000–0077, Quality Assurance Requirements" on your attached document.
- *Mail:* General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW., Washington, DC 20405. ATTN: Ms. Flowers/IC 9000–0077, Quality Assurance Requirements.

Instructions: Please submit comments only and cite Information Collection 9000–0077, Quality Assurance Requirements, in all correspondence related to this collection. Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Mr. Curtis E. Glover, Sr., Procurement Analyst, Contract Policy Division, at 202–501–1448 or email *curtis.glover@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

Supplies and services acquired under Government contracts must conform to the contract's quality and quantity requirements. FAR Part 46 prescribes inspection, acceptance, warranty, and other measures associated with quality requirements. Standard clauses related to inspection require the contractor to provide and maintain an inspection system that is acceptable to the Government; gives the Government the right to make inspections and test while work is in process; and requires the contractor to keep complete, and make available to the Government, records of its inspection work. A notice was published in the **Federal Register** at 81 FR 11794 on March 7, 2016. No comments were received.

B. Annual Reporting Burden

Respondents: 138,292.

Responses per Respondent: 1.03226.

Total Responses: 142,753.

Hours per Response: .83511.

Total Burden hours: 119,214.

Affected Public: Businesses or other for-profit and not-for-profit institutions.

Frequency: On occasion.

C. Public Comments

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW., Washington, DC 20405, telephone 202–501–4755. Please cite OMB Control No. 9000–0077, Quality Assurance Requirements, in all correspondence.

Dated: May 17, 2016.

Lorin S. Curit,

Director, Federal Acquisition Policy, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2016–12002 Filed 5–20–16; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–16–16BX]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The notice for the proposed information collection is published to obtain comments from the public and affected agencies.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address any of the following: (a) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) Enhance the quality, utility, and clarity of the information to be collected; (d) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses; and (e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570 or send an email to *omb@cdc.gov.* Written comments and/or suggestions regarding the items contained in this notice should be directed to the Attention: CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

Monitoring and Reporting System (MRS) for Rape Prevention and Education (RPE) Program Awardees—New—National Center for Injury Prevention and Control NCIPC), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Sexual violence (SV) is a major public health problem, but it is preventable. According to CDC's National Intimate Partner and Sexual Violence Survey (NISVS), nearly 1 in 5 women and 1 in 71 men in the U.S. have been raped during their lifetime, and nearly 1 in 2 women and 1 in 5 men have experienced severe SV victimization other than rape at some point in their lives. The majority of victimization starts early in life with approximately 80% of female victims experiencing their first rape before the age of 25, and almost half experiencing their first rape before the age of 18.

CDC's RPE Program is a national initiative that addresses SV through cooperative agreement funding and technical assistance to health departments in all 50 states, the District of Columbia, and four territories (*e.g.,* Guam, Puerto Rico, U.S. Virgin Islands, and the Commonwealth of Northern Mariana Islands) to conduct state-, district-, and territorial-wide SV prevention activities. The Violence against Women Act of 1994 (VAWA) and as amended in the Violence Against Women Reauthorization Act of 2013 authorize the RPE program and legislatively states that awardees will allot RPE funds for prevention activities conducted by local organizations (*i.e.,* RPE sub-awardees), which include rape crisis centers; State, territorial, or tribal sexual assault coalitions; and other public and private nonprofit entities (*e.g.,* community-based organizations, nongovernmental organizations, and academic institutions).

The CDC seeks a three-year OMB approval to collect information from 55 RPE awardees (health departments in all 50 states, District of Columbia, and four U.S. territories, *i.e.,* Guam, Puerto Rico, U.S. Virgin Islands, and the Commonwealth of Northern Mariana Islands) and their designees. RPE awardees will report activity information to CDC annually through the Monitoring and Reporting System (MRS), which consists of two reporting tools, Work Plan Tool and Program Report Tool. The Work Plan Tool consists of items about awardees' annual goals, objectives, progress, and performance towards overall cooperative agreement purpose and strategies. The Program Report Tool consists of items to assess awardees' implementation, use of evidence-based prevention strategies, and use of the public health approach. The tools in the MRS provide a systematic format to collect data related to implementation and performance consistently across all awardees.

Information to be collected will provide crucial data for program performance monitoring, will allow CDC analyze and synthesize information across multiple RPE programs, help ensure consistency in documenting progress and TA, enhance accountability of the use of federal funds, and provide timely reports as frequently requested by HHS, the White House, and Congress. It provides CDC with the capacity to respond in a timely manner to requests for information about the program, improve real-time communications between CDC and RPE awardees, and strengthen CDC's ability to monitor and evaluate awardees' progress and performance.

The estimated annual burden hours are 654. There is no cost to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
RPE Program Awardees (State, District of Columbia, and Territorial Health Departments) and Designees.	Work Plan Tool—Initial	18	1	10
	Program Report Tool—Initial	18	1	8
	Work Plan Tool—Annual Reporting.	55	1	3
	Program Report Tool—Annual Reporting.	55	1	3

Leroy A. Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2016–12053 Filed 5–20–16; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–16–16AJE; Docket No. CDC–2016–0043]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing efforts to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. This notice invites comment on the proposed National Health and Nutrition Examination Survey (NHANES) Longitudinal Study—Feasibility Component. This project will provide a logistical test of proposed survey procedures along with contact, interview, and examination rates for a sample of previously examined NHANES participants. The information obtained will be used to determine the feasibility of conducting future follow-up surveys.

DATES: Written comments must be received on or before July 22, 2016.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2016–0043 by any of the following methods:

- *Federal eRulemaking Portal: Regulation.gov.* Follow the instructions for submitting comments.
- *Mail:* Leroy A. Richardson, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. All relevant comments received will be posted without change to *Regulations.gov,* including any personal information provided. For access to the docket to read background documents or comments received, go to *Regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Leroy A. Richardson, the Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30329; phone: 404–639–7570; Email: *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information.

Proposed Project

The NHANES Longitudinal Study—Feasibility Component—New—National Center for Health Statistics (NCHS), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Section 306 of the Public Health Service (PHS) Act (42 U.S.C. 242k), as amended, authorizes that the Secretary of Health and Human Services (DHHS), acting through NCHS, shall collect statistics on the extent and nature of illness and disability; environmental, social and other health hazards; and determinants of health of the population of the United States. Under this authorization, the National Health and Nutrition Examination Surveys (NHANES) have been conducted periodically between 1970 and 1994, and continuously since 1999 by NCHS, CDC to produce descriptive statistics on the health and nutrition status of the general population based on direct physical measurements.

The increasing prevalence of obesity and chronic diseases, including diabetes, cardiovascular and kidney diseases, is an important public health issue. If feasible, re-contacting past NHANES participants could provide information about changes in their health condition, exposure to risk factors, and utilization of healthcare since the time of their original NHANES exam, thereby making it possible to estimate the incidence of various chronic conditions. The survey's extensive baseline data on health conditions, nutritional status, risk behaviors, and environmental exposures could further allow the identification and monitoring of the impact of these factors on the participant's current health status. Planning activities for a future longitudinal study of all NHANES examined adults from 2007–2014 have been initiated. This study—the NHANES Longitudinal Study, targeted to start data collection in 2019 or 2020, will provide data to estimate the incidence of selected health outcomes in the U.S. population and relative risk related to other baseline data. The data collection effort proposed in this announcement is only for the Feasibility Component of the NHANES Longitudinal Study. The interview and examination content proposed in the Feasibility Component represents the core module of the future NHANES Longitudinal Study.

Not since the NHANES I Epidemiologic Follow-up Study (NHEFS), which was also conducted by NCHS, has there been a follow-up of a nationally representative cohort to assess the relations between baseline clinical, nutritional, and behavioral factors to subsequent morbidity and mortality. While NCHS has prior experience conducting the follow-up of the NHANES I cohort in 1982–1984, more than 30 years has passed. Since then, response rates in major federal surveys have declined and obtaining cooperation from the household population has become more difficult. Therefore, before attempting to launch a full scale data collection effort among all examined adults from NHANES 2007–2014, we propose conducting a feasibility study (the NHANES Longitudinal Study—Feasibility Component) to determine whether previously examined participants can be successfully traced, interviewed, and examined. The proposed Feasibility Component is comprised of two elements: (1) A field feasibility test for the core module of the NHANES Longitudinal Study; and (2) a series of targeted methodological tests of additional components and procedures.

An annual sample of 400 respondents (total of 800 participants over the 2-year period) will be selected from the 2007–2014 NHANES examinees (20 years and older) to participate in the field feasibility test. Of these, we expect approximately 11% to be deceased prior to the re-contact, resulting in a target annual sample of 356 living examinees and 44 deceased proxy interview respondents.

As part of the preparation efforts for a longitudinal study of all examined adults from NHANES 2007–2014, up to 375 additional persons per year (750 participants over the 2-year period) may be asked to participate in targeted tests of proposed methods and procedures such as bio-specimen collections, cognitive testing for questions, or protocol tests for additional exam components. These targeted tests will only occur if resources permit and if tracing and participation in the field feasibility test is successful. These targeted methodological studies will be conducted with paid volunteers or past NHANES participants who are not part of the potential NHANES longitudinal study sample (for example, past NHANES participants from the 1999–2006 cycle).

Participation in the field feasibility test and the targeted methodological studies is completely voluntary and confidential. The estimated average burden for the field feasibility test is 42 minutes per respondent (1.5 hours per respondent for 356 living participants and 40 minutes per respondent for 44 proxy of deceased participants, annually). The average burden for the targeted methodological study respondents is 1 hour. A two-year approval is requested.

Demographic information such as name, address, phone numbers, and social security number collected in the baseline NHANES will be used to locate the sampled 800 field feasibility test participants (annual sample of 400). Prior to the re-contact, a review of NHANES-linked mortality files will be conducted to assist in determining the vital status of sampled participants.

Trained interviewers will visit the sampled participants at home to conduct an in-person interview and a health examination. Information that will be collected through the interview includes health status and medical conditions, health care services, health behaviors, and sociodemographic characteristics. In addition, permission for collecting hospital discharge data, including diagnoses at discharge and procedures performed during hospitalization will be obtained during the interview.

Following the interview, a health examination will be conducted as part of the home visit. The respondent's weight, waist circumference, and sitting blood pressure will be measured, and a monofilament assessment may be conducted for neuropathy. In addition, blood and urine will be collected. Examples of laboratory tests planned include hemoglobin A1c from the blood specimen, and albumin and creatinine from the urine collection. This proposed project will assess the feasibility of conducting these tests and procedures in the home examination setting.

A proxy interview will be conducted via telephone for sampled participants who died prior to the re-contact. Information on medical conditions and overnight hospital stays since baseline will be collected.

Although permission will be sought from all field feasibility test participants, hospitalization records will be obtained only for 120 participants annually (240 participants over the 2-year period) to evaluate the record retrieval protocol for the study cohort among different medical facilities. An average of 3 hospital stays per person is anticipated among this cohort, therefore, an estimated 360 requests (120 persons × 3 stays) will be made annually. The estimated burden for hospital record provider is 20 minutes per record.

There is no cost to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
2007–2014 NHANES examinees	Field feasibility test initial contact and appointment scheduling form.	400	1	20/60	133
2007–2014 NHANES examinees	Field feasibility test home visit	356	1	1	356
2007–2014 NHANES examinees	Field feasibility test home urine collection.	356	1	10/60	59
Proxy of deceased 2007–2014 NHANES examinees.	Field feasibility test deceased proxy interview.	44	1	20/60	15
Hospital record providers	Field feasibility test hospital records form.	360	1	20/60	120
Adult volunteers (non-field feasibility test participants).	Targeted methodological studies	375	1	1	375
Total					1,058

Leroy A. Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2016–12008 Filed 5–20–16; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30 Day–16–0987]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The notice for the proposed information collection is published to obtain comments from the public and affected agencies.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address any of the following: (a) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) Enhance the quality, utility, and clarity of the information to be collected; (d) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses; and (e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570 or send an email to *omb@cdc.gov.* Written comments and/or suggestions regarding the items contained in this notice should be directed to the Attention: CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

Qualitative Information Collection on Emerging Diseases among the Foreign-born in the U.S. (OMB Control No. 0920–0987, Expires 09/30/2016)—Extension—Division of Global Migration and Quarantine, National Center for Emerging Zoonotic and Infectious Diseases, Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The Centers for Disease Control and Prevention (CDC), National Center for Emerging and Zoonotic Infectious Diseases (NCEZID), Division of Global Migration and Quarantine (DGMQ), requests approval for an extension of the current generic information collection Qualitative Information Collection on Emerging Diseases among the Foreign-born in the U.S. (OMB Control Number 0920–0987, expiration date 9/30/2016).

This qualitative data collection is needed by DGMQ because foreign-born individuals are considered hard-to-reach populations and are often missed by routine information collection systems in the United States. As a consequence, limited information is available about the health status, knowledge, attitudes, health beliefs and practices related to communicable diseases and other emerging health issues (*e.g.,* tuberculosis, parasitic diseases, lead poisoning, and mental health issues) among foreign-born populations in the United States. Foreign-born populations are very diverse in terms of countries of origin, socio-demographic, cultural and linguistic characteristics and geographic destinations in the U.S. Data is especially limited at the local level.

The purpose of the extension is to continue efforts to improve the agency's understanding of the health status, risk factors for disease, and other health outcomes among foreign-born individuals in the United States. Numerous types of data will be collected under the auspices of this generic information collection. These include, but are not limited to, knowledge, attitudes, beliefs, behavioral intentions, practices, behaviors, skills, self-efficacy, and health information needs and sources.

For example, CDC recently used this generic to collect feedback on Mexican-born audience's preferences for messaging and communication about mosquito-borne diseases to develop effective prevention campaigns as these diseases—especially Zika—pose an increasing threat to global health security.

Under the terms of this generic, CDC will employ focus groups and key informant interviews to collect information. Depending on the specific purpose, the information collection may be conducted either in-person, by telephone, on paper, or online. For each generic information collection, CDC will submit to OMB the project summary and information collection tools.

Estimated Annualized Burden Hours

This requests entails a total of 1,025 respondents and 825 burden hours annually. The respondents to these information collections are foreign born individuals in the United States. There is no cost to respondents other than the time required to provide the information requested.

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Foreign-born from specific country of birth in the United States.	Screeners for focus groups (assuming 2 screenings for each recruited participant in focus groups) (300X2 = 600).	600	1	10/60
Foreign-born from specific country of birth in the United States.	Focus Groups (Approximately 30 focus groups/year and 10 participants per focus group).	300	1	2
Foreign-born community leaders and staff from organizations serving those communities.	Key informant interviews (Approximately 125 interviews/year).	125	1	1

Leroy A. Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2016–12010 Filed 5–20–16; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–16–0950; Docket No. CDC–2016–0044]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing efforts to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. This notice invites comment on the proposed revision of the National Health and Nutrition Examination Survey (NHANES). NHANES programs produce descriptive statistics which measure the health and nutrition status of the general population.

DATES: Written comments must be received on or before July 22, 2016.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2015–0044 by any of the following methods:

- *Federal eRulemaking Portal: Regulation.gov.* Follow the instructions for submitting comments.
- *Mail:* Leroy A. Richardson, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. All relevant comments received will be posted without change to *Regulations.gov,* including any personal information provided. For access to the docket to read background documents or comments received, go to *Regulations.gov.*

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact the Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30329; phone: 404–639–7570; Email: *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information.

Proposed Project

The National Health and Nutrition Examination Survey (NHANES), (OMB No. 0920–0950, expires 12/31/2017)—Revision—National Center for Health Statistics (NCHS), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Section 306 of the Public Health Service (PHS) Act (42 U.S.C. 242k), as amended, authorizes that the Secretary of Health and Human Services (DHHS), acting through NCHS, shall collect statistics on the extent and nature of illness and disability; environmental, social and other health hazards; and determinants of health of the population of the United States. The National Health and Nutrition Examination Surveys (NHANES) have been conducted periodically between 1970 and 1994, and continuously since 1999 by the National Center for Health Statistics, CDC. Annually, approximately 14,410 respondents participate in some aspect of the full survey. Up to 3,500 additional persons might participate in tests of procedures, special studies, or methodological studies (Table 1). Participation in NHANES is completely voluntary and confidential. A three-year approval is requested.

NHANES programs produce descriptive statistics which measure the health and nutrition status of the general population. Through the use of physical examinations, laboratory tests, and interviews NHANES studies the relationship between diet, nutrition and health in a representative sample of the United States. NHANES monitors the prevalence of chronic conditions and risk factors. NHANES data are used to produce national reference data on height, weight, and nutrient levels in the blood. Results from more recent NHANES can be compared to findings reported from previous surveys to monitor changes in the health of the U.S. population over time. NCHS collects personal identification information. Participant level data items will include basic demographic information, name, address, social security number, Medicare number and participant health information to allow for linkages to other data sources such as the National Death Index and data from the Centers for Medicare and Medicaid Services (CMS).

A variety of agencies sponsor data collection components on NHANES. To keep burden down, NCHS cycles in and out various components. The 2017–2018 NHANES physical examination includes the following components: Anthropometry (all ages), 24-hour dietary recall (all ages), physician's examination (all ages, blood pressure is collected here), oral health examination (ages 1 and older), and hearing (ages 6–19 and 70+).

While at the examination center additional interview questions are asked (6 and older), a second 24-hour dietary recall (all ages) is scheduled to be conducted by phone 3–10 days later. In 2017 we plan to add a liver elastography (ultrasound) exam with a set of alcohol questions to complement this exam, an Oral Human Papilloma Virus (HPV) follow-up, and cycle back in bone density for hip and spine into the Dual X-ray Absorptiometry (DXA) exam for (ages 50+). The osteoporosis questionnaire will also cycle back into NHANES to complement the changes to the DXA exam. These questions will be asked of those 40+ In addition, the age range for the existing DXA total body scan will be changed from 6–59 years to 8–69 years.

NHANES plans to conduct a blood pressure methodology study. The study population will be NHANES participants aged 6 and older who agree to come to the Mobile Examination Center (MEC). The survey would also like to conduct an Ambulatory Blood Pressure Pilot Study among NHANES participants ages 18 and older.

The bio-specimens collected for laboratory tests include urine, blood, vaginal and penile swabs, oral rinses and household water collection. Serum, plasma and urine specimens are stored for future testing, including genetic research, if the participant consents. NHANES 2017–18 plans to add three Phthalates in urine (ages 3+), nine Urinary flame retardants in urine (ages 3+), one Insect repellant in urine (ages 3+), one Volatile organic compound (VOC) metabolite in urine (ages 3+), eighteen Tobacco biomarkers in urine (ages 3+), two Metals in urine (ages 3+), Vitamin C in serum (ages 6+), Vitamins A, E, and carotenoids in serum (ages 6+), Unsaturated Iron Binding Capacity (UIBC)/Total Iron Binding Capacity (TIBC) in serum (ages 12+), and Congenital cytomegalovirus (CMV) in sera (ages 1–5). Consent to store DNA is cycling back into NHANES.

In addition metals in whole blood are changing from a one-half sample to a full sample (ages 1+). Polycyclic Aromatic Hydrocarbons (PAHs) are being discontinued in the smoker oversample subgroup, however testing will continue in a ⅓ subsample of general NHANES participants.

The 2017–18 survey will also bring back the Flexible Consumer Behavior Survey Phone follow-Up questionnaire for participant ages 1+. This takes place in the home after the second dietary recall is completed.

The following major examination or laboratory items, that had been included in the 2015–2016 NHANES, were cycled out for NHANES 2017–2018: Pubertal maturation, oral glucose tolerance test (OGTT), dual X-ray absorptiometry scans for vertebral fractures and aortic calcification, three metals in serum and three hormones and binding proteins.

Most sections of the NHANES interviews provide self-reported information to be used either in concert with specific examination or laboratory content, as independent prevalence estimates, or as covariates in statistical analysis (*e.g.,* socio-demographic characteristics). Some examples include alcohol, drug, and tobacco use, sexual behavior, prescription and aspirin use, and indicators of oral, bone, reproductive, and mental health. Several interview components support the nutrition monitoring objective of

NHANES, including questions about food security and nutrition program participation, dietary supplement use, and weight history/self-image/related behavior.

In 2017–2018, we also plan to conduct a Dietary Supplement Imaging pilot study, as well as implement multi-mode screening and electronic consent procedures in NHANES. The consent for birth certificate linkage that had been included in previous NHANES will be dropped from NHANES 2017–2018.

There is no cost to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
Individuals in households	NHANES Questionnaire	14,410	1	2.5	36,025
Individuals in households	Blood Pressure Methodology Study Phase 1	1,404	1	30/60	702
Individuals in households	Blood Pressure Methodology Study Phase 2	2,000	1	30/60	1,000
Individuals in households	Ambulatory Blood Pressure Pilot Study	1,200	1	25	30,000
Individuals in households	Oral HPV rinse Follow-up Study 6 months (estimated 80% of original sample of 3600).	2,880	1	10/60	480
Individuals in households	Oral HPV rinse Follow-up Study 12 Months (estimated 70% of original sample).	2,520	1	10/60	420
Individuals in households	Oral HPV rinse Follow-up Study 18 months (estimated 60% of original sample).	2,160	1	10/60	360
Individuals in households	Oral HPV rinse Follow-up Study 24 Months (estimated 50% of original sample).	1,800	1	10/60	300
Individuals in households	Flexible Consumer Behavior Survey Phone Follow-Up.	5,000	1	20/60	1,667
Individuals in households	Special Studies	3,500	1	3	10,500
Total					81,454

Leroy A. Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2016–12009 Filed 5–20–16; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice of Request for Information by the Presidential Advisory Council on Combating Antibiotic-Resistant Bacteria

AGENCY: Office of the Assistant Secretary for Health, Office of the Secretary, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: The Presidential Advisory Council on Combating Antibiotic-Resistant Bacteria (Advisory Council) requests information from the general public and stakeholders related to efforts and strategies to combat antibiotic-resistance. In the process of developing their report, *Initial Assessments of the National Action Plan for Combating Antibiotic-Resistant Bacteria,* the Advisory Council followed the framework of the National Action Plan for Combating Antibiotic Resistant Bacteria (Action Plan) to hear about a wide range of ongoing and planned activities by the federal government, including some stakeholders/sectors relevant to this overall effort. This Request for Information (RFI) offers the opportunity for interested individuals, organizations, associations, industries, and others, to provide their feedback. Responses to the questions must be received by 11:59 p.m. on June 22, 2016 to be considered. The questions are also available through an online form on the Advisory Council Web page at *www.hhs.gov/ash/carb.* Individuals who wish to send in their responses via email should send an email to *CARB@hhs.gov,* indicating the question number(s) for which they are responding.

DATES: Comments must be received by 11:59 p.m. on June 22, 2016 to be considered.

ADDRESSES: Individuals are encouraged to submit their responses through one of the following methods. Utilization of the online form available on *www.hhs.gov/ash/carb* is the preferred method of submission. Should you choose to send in your responses via email, please be sure to include the question number(s) in the subject line. Do not include in your response information of a confidential nature, such as sensitive personal information or proprietary information. Responses to this notice are not offers and cannot be accepted by the federal government to form a binding contract or issue a grant. Please be aware that your comments will not affirmatively be posted publicly, however they may be made available to the public, in part or in full, subject to applicable laws and regulations.

- *Online Form: www.hhs.gov/ash/carb.* Online submissions will receive an automatic confirmation acknowledging receipt of your response, but will not receive individualized feedback on any suggestions.
- *Email: CARB@hhs.gov.* Please indicate the question number(s) in the subject line of your email. Email submissions will receive an electronic confirmation acknowledging receipt of your response, but will not receive individualized feedback on any suggestions.

SUPPLEMENTARY INFORMATION: Under Executive Order 13676, dated September 18, 2014, authority was given to the Secretary of Health and Human Services (HHS) to establish the Advisory Council, in consultation with the Secretaries of Defense and Agriculture. Activities of the Advisory Council are governed by the provisions of Public Law 92–463, as amended (5 U.S.C. App.), which sets forth standards for the formation and use of federal advisory committees.

The Advisory Council will provide advice, information, and recommendations to the Secretary of HHS regarding programs and policies intended to support and evaluate the implementation of Executive Order 13676, including the National Strategy for Combating Antibiotic-Resistant

Bacteria and the Action Plan. The Advisory Council shall function solely for advisory purposes.

In carrying out its mission, the Advisory Council will provide advice, information, and recommendations to the Secretary regarding programs and policies intended to preserve the effectiveness of antibiotics by optimizing their use; advance research to develop improved methods for combating antibiotic resistance and conducting antibiotic stewardship; strengthen surveillance of antibiotic-resistant bacterial infections; prevent the transmission of antibiotic-resistant bacterial infections; advance the development of rapid point-of-care and agricultural diagnostics; further research on new treatments for bacterial infections; develop alternatives to antibiotics for agricultural purposes; maximize the dissemination of up-to-date information on the appropriate and proper use of antibiotics to the general public and human and animal healthcare providers; and improve international coordination of efforts to combat antibiotic resistance. In response to their mission, the Advisory Council recently released their first report, *Initial Assessments of the National Action Plan for Combating Antibiotic-Resistant Bacteria,* at their second public meeting held on March 30–31, 2016, in Washington, DC.

Background: In the process of developing their report, the Advisory Council followed the framework of the Action Plan to hear about a wide range of ongoing and planned activities by the federal government, including some stakeholders/sectors relevant to this overall effort. Acknowledging that there are others who the Advisory Council would like to hear from, they are seeking that information through this RFI. The purpose of the questions posed in this RFI is to gain additional information from the public on the subject matter in several areas addressed in the Action Plan. The responses gathered from the RFI will be reviewed by the members of the Advisory Council and will be taken into consideration as they move forward with their activities. The responses provided are for the Advisory Council's informational purposes only. Response to this RFI is voluntary. Responders are free to address any or all of the questions below.

Request for Information: To solicit additional information from the public, including individuals, organizations, associations, and industries involved in combating antibiotic-resistance, the Advisory Council seeks responses on the following requests for information:

1. Describe how organizations are influencing curricula regarding primary prevention (antibiotic stewardship, infection prevention, and control). Please include information about certification examinations, requirements, and continuing education, if relevant.

2. Describe how healthcare organizations can best: (a) Educate and provide feedback to providers in clinics/facilities about infectious diseases diagnostic testing, optimal antibiotic prescribing, and infection prevention; where relevant, please include information about what incentives and disincentives these organizations have in place with the goal of improving antibiotic prescribing (*e.g.,* using clinical decision support) and prevent spread of resistant infections; and, (b) encourage and/or incentivize providers to report antibiotic use and resistance data for all patient populations.

3. Please provide examples of successful behavior change models that can be applied to preventive strategies, such as infection control and antibiotic stewardship.

4. Please provide information on the best ways to collect data on antibiotic use [and resistance] in animal agriculture through public-private collaborations. Your response can include information on the types of data to be collected, including the method of collection, and the metrics for reporting the data. If helpful, please cite sample models as examples to depict your answer.

5. Please provide information on the different resources that exist to promote the understanding of how antibiotics are being used in humans and animals in different parts of the world. Your response can include information on the types of support to connect with such resources, as appropriate (examples include public-private partnerships, strategic resourcing, or other means).

More information can be found at *www.hhs.gov/ash/carb.*

Dated: May 18, 2016.

Bruce Gellin,

Designated Federal Officer, Presidential Advisory Council on Combating Antibiotic-Resistant Bacteria, Deputy Assistant Secretary for Health.

[FR Doc. 2016–12043 Filed 5–20–16; 8:45 am]

BILLING CODE 4150–44–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Molecular, Cellular and Developmental Neuroscience Integrated Review Group; Neurotransporters, Receptors, and Calcium Signaling Study Section.

Date: June 16–17, 2016.

Time: 8:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Westin Crystal City, 1800 Jefferson Davis Highway, Arlington, VA 22202.

Contact Person: Peter B. Guthrie, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4182, MSC 7850, Bethesda, MD 20892, (301) 435–1239, *guthriep@csr.nih.gov.*

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group; Molecular and Cellular Endocrinology Study Section.

Date: June 16–17, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The Westgate Hotel, 1055 2nd Ave., San Diego, CA 92101.

Contact Person: John Bleasdale, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6170, MSC 7892, Bethesda, MD 20892, 301–435–4514, *bleasdaleje@csr.nih.gov.*

Name of Committee: Bioengineering Sciences & Technologies Integrated Review Group; Gene and Drug Delivery Systems Study Section.

Date: June 22–23, 2016.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel Bethesda (Formerly Holiday Inn Select), 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Amy L. Rubinstein, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5152, MSC 7844, Bethesda, MD 20892, 301–408–9754, *rubinsteinal@csr.nih.gov.*

Name of Committee: Molecular, Cellular and Developmental Neuroscience Integrated Review Group; Cellular and Molecular Biology of Glia Study Section.

Date: June 23–24, 2016.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The Westgate Hotel, 1055 Second Avenue, San Diego, CA 92101.

Contact Person: Linda MacArthur, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4187, Bethesda, MD 20892, 301–537–9986, *macarthurlh@csr.nih.gov.*

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group; Neurobiology of Motivated Behavior Study Section.

Date: June 23–24, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Warwick Allerton Hotel, 701 North Michigan Avenue, Chicago, IL 60654.

Contact Person: Jasenka Borzan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4214, MSC 7814, Bethesda, MD 20892–7814, 301–435–1787, *borzanj@csr.nih.gov.*

Name of Committee: Oncology 1—Basic Translational Integrated Review Group; Tumor Microenvironment Study Section.

Date: June 23–24, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Solamar, 435 6th Avenue, San Diego, CA 92101.

Contact Person: Angela Y. Ng, Ph.D., MBA, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6200, MSC 7804, Bethesda, MD 20892, 301–435–1715, *ngan@mail.nih.gov.*

Name of Committee: Digestive, Kidney and Urological Systems Integrated Review Group; Hepatobiliary Pathophysiology Study Section.

Date: June 23–24, 2016.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: May Flower Hotel, 1127 Connecticut Ave. NW., Washington, DC 20036.

Contact Person: Jonathan K. Ivins, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2190, MSC 7850, Bethesda, MD 20892, (301) 594–1245, *ivinsj@csr.nih.gov.*

Name of Committee: Digestive, Kidney and Urological Systems Integrated Review Group; Gastrointestinal Mucosal Pathobiology Study Section.

Date: June 23–24, 2016.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Courtyard by Marriott Downtown Silver Spring, 8506 Fenton Street, Silver Spring, MD 20910.

Contact Person: Aiping Zhao, MD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Rm. 2188, MSC 7818, Bethesda, MD 20892–7818, (301) 435–0682, *zhaoa2@csr.nih.gov.*

Name of Committee: Population Sciences and Epidemiology Integrated Review Group; Social Sciences and Population Studies B Study Section.

Date: June 23, 2016.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Fairmont Hotel San Francisco, 950 Mason Street, San Francisco, CA 94108.

Contact Person: Kate Fothergill, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3142, Bethesda, MD 20892, 301–435–2309, *fothergillke@mail.nih.gov.*

Name of Committee: Cardiovascular and Respiratory Sciences Integrated Review Group; Respiratory Integrative Biology and Translational Research Study Section.

Date: June 23, 2016.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Admiral Fell Inn, 888 South Broadway, Baltimore, MD 21231.

Contact Person: Bradley Nuss, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4142, MSC 7814, Bethesda, MD 20892, 301–451–8754, *nussb@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; RFA–RM15–021: Metabolomics Data Analysis (R03).

Date: June 23, 2016.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel Bethesda, 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Kee Hyang Pyon, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5148, MSC 7806, Bethesda, MD 20892, *pyonkh2@csr.nih.gov.*

Name of Committee: Healthcare Delivery and Methodologies Integrated Review Group; Health Disparities and Equity Promotion Study Section.

Date: June 23–24, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Renaissance New Orleans Pere Marquette Hotel, 817 Common Street, New Orleans, LA 70112.

Contact Person: Delia Olufokunbi Sam, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3158, MSC 7770, Bethesda, MD 20892, 301–435–0684, *olufokunbisamd@csr.nih.gov.*

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group; Cellular, Molecular and Integrative Reproduction Study Section.

Date: June 23–24, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: One Washington Circle Hotel, One Washington Circle, Washington, DC 20037.

Contact Person: Gary Hunnicutt, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6164, MSC 7892, Bethesda, MD 20892, 301–435–0229, *hunnicuttgr@csr.nih.gov.*

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group; Clinical and Integrative Diabetes and Obesity Study Section.

Date: June 23–24, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Handlery Union Square Hotel, 351 Geary Street, San Francisco, CA 94102.

Contact Person: Hui Chen, MD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, 301–435–1044, *chenhui@csr.nih.gov.*

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group; Integrative Physiology of Obesity and Diabetes Study Section.

Date: June 23–24, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Renaissance Washington DC, Dupont Circle, 1143 New Hampshire Avenue NW., Washington, DC 20037.

Contact Person: Raul Rojas, Ph.D., Scientific Review Officer, Scientific Review Officer, Center for Scientific Review, 6701 Rockledge Drive, Room 6185, Bethesda, MD 20892, (301) 451–6319, *rojasr@mail.nih.gov.*

Name of Committee: Digestive, Kidney and Urological Systems Integrated Review Group; Systemic Injury by Environmental Exposure.

Date: June 23–24, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda North Marriott Hotel & Conference Center, 5701 Marinelli Road, Bethesda, MD 20852.

Contact Person: Patricia Greenwel, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2178, MSC 7818, Bethesda, MD 20892, 301–435–1169, *greenwep@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Program Project: Biochemical Mechanisms of Phosphatidylinositol-(3,4,5)-Trisphosphate (PIP3) Regulation.

Date: June 23–24, 2016.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Maria DeBernardi, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of

Health, 6701 Rockledge Drive, Room 6158, MSC 7892, Bethesda, MD 20892, 301–435–1355, *debernardima@csr.nih.gov.*

Name of Committee: Molecular, Cellular and Developmental Neuroscience Integrated Review Group; Neurodifferentiation, Plasticity, Regeneration and Rhythmicity Study Section.

Date: June 23–24, 2016.

Time: 9:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Marines Memorial Club Hotel, 609 Sutter Street, San Francisco, CA 94109.

Contact Person: Joanne T. Fujii, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4184, MSC 7850, Bethesda, MD 20892, (301) 435–1178, *fujiij@csr.nih.gov.*

Name of Committee: Healthcare Delivery and Methodologies Integrated Review Group; Biostatistical Methods and Research Design Study Section.

Date: June 23–24, 2016.

Time: 11:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Peter J. Kozel, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3139, Bethesda, MD 20892, 301–435–1116, *kozelp@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: May 17, 2016.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–12023 Filed 5–20–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Sensory and Motor Neurosciences, Cognition and Perception.

Date: June 23–24, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The St. Regis Washington DC, 923 16th Street NW., Washington, DC 20006.

Contact Person: Sharon S. Low, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5104, MSC 7846, Bethesda, MD 20892, 301–237–1487, *lowss@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Immunology.

Date: June 23–24, 2016.

Time: 8:00 a.m. to 5:00 a.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Washington/Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Alok Mulky, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4203, Bethesda, MD 20892, (301) 435–3566, *alok.mulky@nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Brain Disorders and Related Neurosciences.

Date: June 23–24, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Wyndham Grand Hotel, Chicago, 71 East Upper Wacker Drive, Chicago, IL 60601.

Contact Person: Vilen A. Movsesyan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4040M, MSC 7806, Bethesda, MD 20892, 301–402–7278, *movsesyanv@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Neurodevelopment, Synaptic Plasticity and Neurodegeneration.

Date: June 23–24, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites Convention Center, DC, 900 10th St. NW., Washington, DC 20001.

Contact Person: Mary Schueler, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5214, MSC 7846, Bethesda, MD 20892, 301–451–0996, *marygs@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Cell Biology, Developmental Biology, and Bioengineering.

Date: June 23–24, 2016.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The Westgate Hotel, 1055 Second Avenue, San Diego, CA 92101.

Contact Person: Raj K. Krishnaraju, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6190, Bethesda, MD 20892, 301–435–1047, *kkrishna@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Drug Discovery for Aging, Neuropsychiatric and Neurologic Disorders.

Date: June 23–24, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Wyndham Grand Hotel, 71 East Wacker Drive, Chicago, IL 60601.

Contact Person: Yuan Luo, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5207, MSC 7846, Bethesda, MD 20892, 301–915–6303, *luoy2@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Ocular Surface, Cornea, and Refractive Error.

Date: June 23, 2016.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Courtyard by Marriott, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

Contact Person: Kristin Kramer, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5205, MSC 7846, Bethesda, MD 20892, (301) 437–0911, *kramerkm@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Clinical Neurophysiology, Devices, Neuroprosthetics, and Biosensors.

Date: June 23–24, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Melrose Hotel, 2430 Pennsylvania Ave. NW., Washington, DC 20037.

Contact Person: Cristina Backman, Ph.D., Scientific Review Officer, ETTN IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5211, MSC 7846, Bethesda, MD 20892, *cbackman@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR13–325: Development of Appropriate Pediatric Formulations.

Date: June 23–24, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites Convention Center, DC, 900 10th Street NW., Washington, DC 20001.

Contact Person: Paek-Gyu Lee, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4201, MSC 7812, Bethesda, MD 20892, (301) 613–2064, *leepg@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Medical Imaging.

Date: June 23–24, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Alexandria Mark Center, 5000 Seminary Road, Alexandria, VA 22311.

Contact Person: Leonid V. Tsap, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5128, MSC 7854, Bethesda, MD 20892, (301) 435–2507, *tsapl@csr.nih.gov.*

Name of Committee: Biobehavioral and Behavioral Processes Integrated Review Group; Adult Psychopathology and Disorders of Aging Study Section.

Date: June 23–24, 2016.

Time: 8:30 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Marines' Memorial Club and Hotel, 609 Sutter Street, San Francisco, CA 94102.

Contact Person: Serena Chu, Ph.D., Scientific Review Officer, BBBP IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3178, MSC 7848, Bethesda, MD 20892, (301) 500–5829, *sechu@csr.nih.gov.*

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group; Prokaryotic Cell and Molecular Biology Study Section.

Date: June 23–24, 2016.

Time: 8:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Renaissance M Street Hotel, 1143 New Hampshire Avenue NW., Washington, DC 20037.

Contact Person: Dominique Lorang-Leins, Ph.D., Scientific Review Officer, National Institutes of Health, Center for Scientific Review, 6701 Rockledge Drive, Room 5108, MSC 7766, Bethesda, MD 20892, 301.326.9721, *Lorangd@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846-93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: May 17, 2016.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–12022 Filed 5–20–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Notice Announcing the Automated Commercial Environment (ACE) as the Sole CBP-Authorized Electronic Data Interchange (EDI) System for Processing Electronic Entry and Entry Summary Filings

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: General notice.

SUMMARY: This document announces that the Automated Commercial Environment (ACE) will be the sole electronic data interchange (EDI) system authorized by the Commissioner of U.S. Customs and Border Protection (CBP) for processing electronic entry and entry summary filings associated with most entry types. This document also announces that the Automated Commercial System (ACS) will no longer be a CBP-authorized EDI system for purposes of processing the electronic filings specified in this notice.

DATES: *Effective: July 23, 2016.* ACE will be the sole CBP-authorized EDI system for processing electronic entry and entry summary filings of certain entry types, and ACS will no longer be a CBP-authorized EDI system for purposes of processing the electronic filings specified in this notice.

FOR FURTHER INFORMATION CONTACT: Questions related to this notice may be emailed to *ASKACE@cbp.dhs.gov* with the subject line identifier reading "ACS to ACE July 23, 2016 transition".

SUPPLEMENTARY INFORMATION:

Background

Statutory Authority

Section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), establishes the requirement for importers of record to make entry for merchandise to be imported into the customs territory of the United States. Customs entry information is used by U.S. Customs and Border Protection (CBP) and Partner Government Agencies (PGAs) to determine whether merchandise may be released from CBP custody. Importers of record are also obligated to complete the entry by filing an entry summary declaring the value, classification, rate of duty applicable to the merchandise and such other information as is necessary for CBP to properly assess duties, collect accurate statistics and determine whether any other applicable requirement of law is met.

The customs entry requirements were amended by Title VI of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057, December 8, 1993), commonly known as the Customs Modernization Act, or Mod Act. In particular, section 637 of the Mod Act amended section 484(a)(1)(A) of the Tariff Act of 1930 (19 U.S.C. 1484(a)(1)(A)) by revising the requirement to make and complete customs entry by submitting documentation to CBP to allow, in the alternative, the electronic transmission of such entry information pursuant to a CBP-authorized electronic data interchange (EDI) system. CBP created the Automated Commercial System (ACS) to track, control, and process all commercial goods imported into the United States. CBP established the specific requirements and procedures for the electronic filing of entry and entry summary data for imported merchandise through the Automated Broker Interface (ABI) to ACS.

Transition From ACS to ACE

In an effort to modernize the business processes essential to securing U.S. borders, facilitating the flow of legitimate shipments, and targeting illicit goods pursuant to the Mod Act and the Security and Accountability for Every (SAFE) Port Act of 2006 (Pub. L. 109–347, 120 Stat. 1884), CBP developed the Automated Commercial Environment (ACE) to eventually replace ACS as the CBP-authorized EDI system. Over the last several years, CBP has tested ACE and provided significant public outreach to ensure that the trade community is fully aware of the transition from ACS to ACE.

On February 19, 2014, President Obama issued Executive Order (EO) 13659, *Streamlining the Export/Import Process for America's Businesses,* in order to reduce supply chain barriers to commerce while continuing to protect our national security, public health and safety, the environment, and natural resources. *See* 79 FR 10657 (February 25, 2014). Pursuant to EO 13659, a deadline of December 31, 2016, was established for participating Federal agencies to have capabilities, agreements, and other requirements in place to utilize the International Trade Data System (ITDS) and supporting systems, such as ACE, as the primary means of receiving from users the standard set of data and other relevant documentation (exclusive of applications for permits, licenses, or certifications) required for the release of imported cargo and clearance of cargo for export.

On October 13, 2015, CBP published an Interim Final Rule in the **Federal Register** (80 FR 61278) that designated ACE as a CBP-authorized EDI system. The designation of ACE as a CBP-authorized EDI system was effective November 1, 2015. In the Interim Final Rule, CBP stated that ACS would be phased out and anticipated that ACS would no longer be supported for entry and entry summary filing by the end of February 2016. Filers were encouraged to adjust their business practices so that they would be prepared when ACS was decommissioned.

CBP has developed a staggered transition strategy for decommissioning ACS. The first two phases of the transition were announced in a **Federal Register** notice on February 29, 2016. (81 FR 10264). The third phase of the transition was announced in a **Federal Register** notice on May 16, 2016. (81 FR 30320). This notice announces the fourth phase of the transition. In this phase, CBP will decommission ACS for most entry and entry summary filings.

ACE as the Sole CBP-Authorized EDI System for the Processing of Certain Electronic Entry and Entry Summary Filings

This notice announces that, effective July 23, 2016, ACE will be the sole CBP-authorized EDI system for the electronic entry and entry summary filings listed below, for all filers. These electronic filings must be formatted for submission in ACE, and will no longer be accepted in ACS.

- 01—Consumption—Free and Dutiable
- 02—Consumption—Quota/Visa
- 03—Consumption—Antidumping/Countervailing Duty
- 06—Consumption—Foreign Trade Zone (FTZ)
- 07—Consumption—Antidumping/Countervailing Duty and Quota/Visa Combination
- 11—Informal—Free and Dutiable
- 12—Informal—Quota/Visa (other than textiles)
- 21—Warehouse
- 22—Re-Warehouse
- 23—Temporary Importation Bond (TIB)
- 31—Warehouse Withdrawal—Consumption
- 32—Warehouse Withdrawal—Quota
- 34—Warehouse Withdrawal—Antidumping/Countervailing Duty
- 38—Warehouse Withdrawal—Antidumping/Countervailing Duty & Quota/Visa Combination
- 51—Defense Contract Administration Service Region (DCASR)
- 52—Government—Dutiable
- 61—Immediate Transportation
- 62—Transportation and Exportation
- 63—Immediate Exportation
- 69—Transit (Rail only)
- 70—Multi-Transit (Rail only)

ACS as the Sole CBP-Authorized EDI System for the Processing of Certain Electronic Entry and Entry Summary Filings

Electronic entry and entry summary filings for the following entry types must continue to be filed only in ACS. CBP will publish a subsequent **Federal Register** Notice in the future when these entry and entry summary filings will be transitioned in ACE.

- 08—NAFTA Duty Deferral
- 09—Reconciliation Summary
- 41—Direct Identification Manufacturing Drawback
- 42—Direct Identification Unused Merchandise Drawback
- 43—Rejected Merchandise Drawback
- 44—Substitution Manufacturer Drawback
- 45—Substitution Unused Merchandise Drawback
- 46—Other Drawback

Due to Low Shipment Volume, Filings for the Following Entry Types Will Not Be Automated in Either ACS or ACE

- 04—Appraisement
- 05—Vessel—Repair
- 24—Trade Fair
- 25—Permanent Exhibition
- 26—Warehouse—Foreign Trade Zone (FTZ) (Admission)
- 33—Aircraft and Vessel Supply (For Immediate Exportation)
- 64—Barge Movement
- 65—Permit to Proceed
- 66—Baggage

Dated: May 18, 2016.

R. Gil Kerlikowske,

Commissioner, U.S. Customs and Border Protection.

[FR Doc. 2016–12067 Filed 5–20–16; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2015–0017]

Notice of Public Workshop Regarding the Cybersecurity Information Sharing Act of 2015 Implementation

AGENCY: National Protection and Programs Directorate, DHS.

ACTION: Notice of public workshop.

SUMMARY: The Department of Homeland Security (DHS) announces a public workshop on Thursday, June 9, 2016 to discuss information sharing as related to Title I of the Cybersecurity Act of 2015, the Cybersecurity Information Sharing Act.

DATES: The workshop will be held on Thursday, June 9, 2016, from 9:00 a.m. to 4:00 p.m. EDT. The meeting may conclude before the allotted time if all matters for discussion have been addressed.

ADDRESSES: The meeting location is the Navy League of the United States, 2300 Wilson Boulevard, #200, Arlington, VA 22201. *See the Submitting Written Comments section for the address to submit written or electronic comments.*

SUPPLEMENTARY INFORMATION: Information about the Cybersecurity Information Sharing Act of 2015 and Automated Indicator Sharing can be found at: *https://www.dhs.gov/ais.*

FOR FURTHER INFORMATION CONTACT: If you have questions concerning the meeting, please contact *cisaimplementation@HQ.DHS.GOV* or Robert Hopkins, Director, External Affairs, Office of Cybersecurity and Communications, Department of Homeland Security, *Robert.Hopkins@hq.dhs.gov* or (703) 235–5788.

Background and Purpose

On December 18, 2015, the President signed into law the Cybersecurity Act of 2015 as a part of the FY16 omnibus spending bill. Both Congress and the White House were active on the issue of cybersecurity during 2015, with multiple bills passed in each chamber. The resulting law included in the omnibus spending legislation reflects a reconciliation of the cybersecurity bills passed in the House and Senate in 2015.

Title I, the Cybersecurity Information Sharing Act (CISA), authorizes companies to voluntarily share cyber threat indicators and defensive measures with the Federal Government, State, Local, Tribal, and Territorial (SLTT) entities, and other private sector entities through a capability and process established by DHS. The law also:

- Provides liability protection to private sector entities for information shared in accordance with the law;
- Directs DHS to share private sector cyber threat indicators and defensive measures in an automated and real-time manner with Federal departments and agencies for cybersecurity purposes;
- Establishes measures to ensure that cybersecurity information received, retained, or shared by the DHS mechanism will not violate the privacy or civil liberties of individuals, under procedures jointly drafted by the Department of Justice and DHS;
- Protects shared information from public disclosure; and
- Sunsets the provisions for these information sharing measures in 10 years.

The CISA establishes an additional statutory basis for the Department's information sharing efforts with the Automated Indicator Sharing (AIS) initiative, which enables real-time sharing of cyber threat indicators between DHS and stakeholders in the public and private sectors. The DHS real-time sharing process (and the web form and email processes) for cyber threat indicator and defensive measure sharing do not replace pre-existing cyber incident and cyber-crime reporting.

The purpose of the public workshop is to engage and educate stakeholders and the general public on CISA implementation and related issues such as:

- What is CISA?
- What is the Automated Indicator Sharing (AIS) initiative?
- What are the privacy concerns around CISA and how are privacy protections built into information sharing?
- What is the benefit of participating in an Information Sharing and Analysis Organization (ISAO) as it pertains to CISA?
- How does an organization (Federal or non-federal) connect and participate in AIS?

The event will consist of a combination of keynote addresses, presentations, and panel discussions, each of which will provide the opportunity for audience members to ask questions.

Information on Service for Individuals With Disabilities

For information on facilities or services for individuals with disabilities or to request special assistance at the public meeting, contact *cisaimplementation@hq.dhs.gov* and write "Special Assistance" in the subject box or contact the meeting coordinator from the **FOR FURTHER INFORMATION CONTACT** section of this notice.

Meeting Details

Members of the public may attend this workshop by RSVP only up to the seating capacity of the room. A valid government-issued photo identification (for example, a driver's license) will be required for entrance to the meeting space. Those who plan to attend should RSVP by emailing *cisaimplementation@hq.dhs.gov* 7 days prior to the meeting. Requests made after June 2, 2016 may not be able to be accommodated.

We encourage you to participate in this meeting by submitting comments to the CISA Implementation mailbox (*cisaimplementation@hq.dhs.gov*), commenting orally, or submitting written comments to the DHS personnel attending the meeting who are identified to receive them.

Submitting Written Comments

You may also submit written comments to the docket using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.* Although comments are being submitted to the Federal eRulemaking Portal, this is a tool to provide transparency to the general public, not because this is a rulemaking action.

(2) *Email: cisaimplementation@hq.dhs.gov.* Include the docket number in the subject line of the message.

(4) *Mail:* Robert Hopkins, Director, External Affairs, Office of Cybersecurity and Communications, NPPD, Department of Homeland Security, 245 Murray Lane, Mail Stop 0615, Arlington, VA 20598–0615.

To avoid duplication, please use only one of these three methods. All comments must either be submitted to the online docket on or before June 2, 2016, or reach the Docket Management Facility by that date.

Authority: Secs. 103 and 105, Pub. L. 114–113, Div. N, Title I.

Dated: May 16, 2016.

Andy Ozment,

Assistant Secretary, Cybersecurity and Communications, National Protection and Programs Directorate, Department of Homeland Security.

[FR Doc. 2016–12018 Filed 5–20–16; 8:45 am]

BILLING CODE 9110–9P–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0043]

Agency Information Collection Activities: Application for Temporary Protected Status, Form I–821; Revision of a Currently Approved Collection

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 60-Day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) invites the general public and other Federal agencies to comment upon this proposed revision of a currently approved collection of information or new collection of information. In accordance with the Paperwork Reduction Act (PRA) of 1995, the information collection notice is published in the **Federal Register** to obtain comments regarding the nature of the information collection, the categories of respondents, the estimated burden (*i.e.* the time, effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments.

DATES: Comments are encouraged and will be accepted for 60 days until July 22, 2016.

ADDRESSES: All submissions received must include the OMB Control Number 1615–0043 in the subject box, the agency name and Docket ID USCIS–2007–0013. To avoid duplicate submissions, please use only *one* of the following methods to submit comments:

(1) *Online.* Submit comments via the Federal eRulemaking Portal Web site at *http://www.regulations.gov* under e-Docket ID number USCIS–2007–0013;

(2) *Email.* Submit comments to *USCISFRComment@uscis.dhs.gov;*

(3) *Mail.* Submit written comments to DHS, USCIS, Office of Policy and Strategy, Chief, Regulatory Coordination Division, 20 Massachusetts Avenue NW., Washington, DC 20529–2140.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Acting Chief, 20 Massachusetts Avenue NW., Washington, DC 20529–2140, Telephone number (202) 272–8377 (This is not a toll-free number. Comments are not accepted via telephone message). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS Web site at *http://www.uscis.gov,* or call the USCIS National Customer Service Center at (800) 375–5283; TTY (800) 767–1833.

SUPPLEMENTARY INFORMATION:

Comments

You may access the information collection instrument with instructions, or additional information by visiting the Federal eRulemaking Portal site at: *http://www.regulations.gov* and enter USCIS–2007–0013 in the search box. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Temporary Protected Status.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–821; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. Form I–821 is necessary for USCIS to gather the information necessary to adjudicate TPS applications and determine if an applicant is eligible for TPS.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–821 is 368,760 respondents at an estimated 1 hour and 55 minutes (1.92 hours) per response. 366,235 respondents for biometrics processing at an estimated 1 hour and 10 minutes (1.17 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 1,136,514 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $46,555,950.

Dated: May 17, 2016.

Samantha Deshommes,

Acting Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2016–12048 Filed 5–20–16; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R7–ES–2016–N067; FXES11130700000–167–FF07CAFB00]

Endangered and Threatened Wildlife and Plants; Initiation of a 5-Year Review of the Eskimo Curlew

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice; request for information.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce our intention to conduct a 5-year status review under the Endangered Species Act of 1973, as amended (ESA), for the Eskimo curlew. A 5-year status review is based on the best scientific and commercial data available at the time of the review; therefore, we are requesting submission of information that has become available since the last review of the species in 2011.

DATES: To ensure consideration of your comments in our preparation of this 5-year status review, we must receive your comments and information by July 22, 2016. However, we will accept information about any species at any time.

ADDRESSES: Please submit your information on the current status of the Eskimo curlew by one of the following methods: Email: *ted_swem@fws.gov* or U.S. mail or hand delivery: U.S. Fish and Wildlife Service, ATTN: Eskimo curlew, 101 12th Avenue, Room 110, Fairbanks, AK 99701. For more about submitting information, see Request for Information in the **SUPPLEMENTARY INFORMATION** section, below.

FOR FURTHER INFORMATION CONTACT: Ted Swem, Fairbanks Fish and Wildlife Field Office, by telephone at 907–456–0441. Individuals who are hearing impaired or speech impaired may call the Federal Relay Service at 800–877–8339 for TTY assistance.

SUPPLEMENTARY INFORMATION: We are initiating a 5-year status review under the ESA for the Eskimo curlew (*Numenius borealis*). A 5-year status review is based on the best scientific and commercial data available at the time of the review; therefore, we are requesting submission of information that has become available since the last review of the species in 2011.

Why do we conduct a 5-year review?

Under the ESA (16 U.S.C. 1531 *et seq.*), we maintain Lists of Endangered and Threatened Wildlife and Plants (which we collectively refer to as the List) in the Code of Federal Regulations (CFR) at 50 CFR 17.11 (for animals) and 17.12 (for plants). Section 4(c)(2)(A) of the Act requires us to review each listed species' status at least once every 5 years. Further, our regulations at 50 CFR 424.21 require that we publish a notice in the **Federal Register** announcing those species under active review. For additional information about 5-year reviews, go to *http://www.fws.gov/endangered/what-we-do/recovery-overview.html,* scroll down to "Learn More about 5-Year Reviews," and click on our fact sheet.

What information do we consider in our review?

A 5-year review considers all new information available at the time of the review. In conducting these reviews, we consider the best scientific and commercial data that have become available since the listing determination or most recent status review, such as:

(1) The biology of the species, including, but not limited to, population trends, distribution, abundance, demographics, and genetics;

(2) Habitat conditions, including, but not limited to, amount, distribution, and suitability;

(3) Conservation measures that have been implemented that benefit the species;

(4) Threat status and trends in relation to the five listing factors (as defined in section 4(a)(1) of the Act); and

(5) Other new information, data, or corrections, including, but not limited to, taxonomic or nomenclatural changes, identification of erroneous information contained in the List, and improved analytical methods.

Any new information will be considered during the 5-year review and will also be useful in evaluating the ongoing recovery programs for the species.

In the case of the Eskimo curlew, we concluded in our 2011 5-year review that the probability that the species remained extant was extremely low based on the scarcity of recent sightings and the length of time that has passed since the last sighting that was confirmed with physical evidence. We will therefore focus this 5-year review upon reported sightings or other recent information on the species' possible existence. Thus, we ask, in particular, for information on recent sightings, including indication as to whether corroborating evidence (such as photographs) is available.

Species Under Review

Entity listed: Eskimo curlew (*Numenius borealis*).

Where listed: Wherever found.

Classification: Endangered.

Date listed (publication date for final listing rule): March 11, 1967, under the Endangered Species Preservation Act of 1966.

Federal Register citation for final listing rule: 32 FR 4001.

Request for Information

To ensure that a 5-year review is complete and based on the best available scientific and commercial information, we request new information from all sources. See What Information Do We Consider in Our Review? for specific criteria. If you submit information, please support it with documentation such as maps, bibliographic references, methods used to gather and analyze the data, and/or copies of any pertinent publications, reports, or letters by knowledgeable sources. If you submit purported sightings of the species, please also provide supporting documentation in any form to the extent that it is available.

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comments, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Completed and Active Reviews

A list of all completed and currently active 5-year reviews addressing species for which the Alaskan Region of the Service has lead responsibility is available at *http://www.fws.gov/alaska/fisheries/endangered/reviews.htm.*

Authority

This document is published under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: April 12, 2016.

Brian Glaspell,

Acting Regional Director, Alaska Region.

[FR Doc. 2016–12079 Filed 5–20–16; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–NER–FRSP–20694; PS.SSARA0003.00.1]

Minor Boundary Revision at Fredericksburg and Spotsylvania County Battlefields Memorial National Military Park

AGENCY: National Park Service, Interior.

ACTION: Notification of boundary revision.

SUMMARY: The boundary of Fredericksburg and Spotsylvania County Battlefields Memorial National Military Park is modified to include four tracts containing 25.55 acres of land, more or less, located in Orange County and Spotsylvania County, Virginia, immediately adjoining the boundary of Fredericksburg and Spotsylvania County Battlefields Memorial National Military Park. Subsequent to the proposed boundary revision, the National Park Service will acquire one tract by donation from the Civil War Trust and two tracts by purchase from the Central Virginia Battlefields Trust. The fourth tract, already owned by the United States and acquired as an uneconomic remnant, will be brought into the boundary so that it can be administered as part of the park.

DATES: The effective date of this boundary revision is May 23, 2016.

ADDRESSES: The map depicting this boundary revision is available for inspection at the following locations: National Park Service, Land Resources Program Center, Northeast Region, New England Office, 115 John Street, 5th Floor, Lowell, MA 01852, and National Park Service, Department of the Interior, 1849 C Street NW., Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Deputy Realty Officer Rachel McManus, National Park Service, Land Resources Program Center, Northeast Region, New England Office, 115 John Street, 5th Floor, Lowell, MA 01852, telephone (978) 970–5260.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, pursuant to 54 U.S.C. 100506(c), the boundary of Fredericksburg and Spotsylvania County Battlefields Memorial National Military Park is modified to include four adjoining tracts totaling 25.55 acres of land. The boundary revision is depicted on Map No. 326/129075, dated July 8, 2015.

54 U.S.C. 100506(c) provides that, after notifying the Committee on Natural Resources of the House of Representatives and the Committee on Energy and Natural Resources of the Senate, the Secretary of the Interior is authorized to make this boundary revision upon publication of notice in the **Federal Register**. The Committees have been notified of this boundary revision. This boundary revision and subsequent acquisition will ensure preservation and protection of the park's scenic and historic resources.

Dated: April 5, 2016.

Michael A. Caldwell,

Regional Director, Northeast Region.

[FR Doc. 2016–12049 Filed 5–20–16; 8:45 am]

BILLING CODE 4310–WV–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–998]

Certain Hybrid Electric Vehicles and Components Thereof, Institution of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on April 15, 2016, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Paice LLC of Baltimore, Maryland and Abell Foundation, Inc. of Baltimore, Maryland. An amended complaint was filed on April 29, 2016. The amended complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain hybrid electric vehicles and components thereof by reason of infringement of certain claims of U.S. Patent No. 7,104,347 ("the '347 patent"); U.S. Patent No. 7,237,634 ("the '634 patent"); and U.S. Patent No. 8,214,097 ("the '097 patent"). The amended complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainants request that the Commission institute an investigation and, after the investigation, issue a limited exclusion order and cease and desist orders.

ADDRESSES: The amended complaint, except for any confidential information contained therein, is available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Room 112, Washington, DC 20436, telephone (202) 205–2000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: The Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2560.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2015).

Scope of Investigation: Having considered the amended complaint, the U.S. International Trade Commission, on May 17, 2016, *ordered that—*

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain hybrid electric vehicles and components thereof by reason of infringement of one or more of claims 24, 25, 27, 28, 30, 32, and 41 of the '347 patent; claims 33–44, 46, 50, 52–55, 91, 92, 94, 95, 97, 110, 112, 226, 227, 229–231, 239–241, 252, 253, 255–259, 265–267, 278, 279, 281–283, 285, 289–291 of the '634 patent; and claims 21, 27, 30, 33, and 37 of the '097 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainants are:

Paice LLC, 111 South Calvert Street, Suite 2310, Baltimore, MD 21202

Abell Foundation, Inc., 111 South Calvert Street, Suite 2300, Baltimore, MD 21202

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Volkswagen AG, Brieffach 1849, D–38436 Wolfsburg, Germany

Volkswagen Group of America, Inc., 2200 Ferdinand Porsche Drive, Herndon, VA 20171

Dr. Ing. H.C. F. Porsche AG, Porscheplatz 1, D–70435, Germany

Porsche Cars North America, Inc., 980 Hammond Drive, Suite 1000, Atlanta, GA 30328

Audi AG, Ettinger Straße, D–85045, Ingolstadt, Germany

Audi of America, LLC, 2200 Ferdinand Porsche Drive, Herndon, VA 20171

(3) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

The Office of Unfair Import Investigations will not participate as a party in this investigation.

Responses to the amended complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the amended complaint and the notice of investigation. Extensions of time for submitting responses to the amended complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the amended complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the amended complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the amended complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: May 18, 2016.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2016–12073 Filed 5–20–16; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–999]

Certain Air Mattress Bed Systems and Components Thereof; Institution of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on April 20, 2016, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Select Comfort Corporation of Minneapolis, Minnesota and Select Comfort SC Corporation of Greenville, South Carolina. The complaint alleges violations of section 337 based upon the importation into the United States and the sale within the United States after importation of certain air mattress bed systems and components thereof by reason of infringement of certain claims of U.S. Patent No. 6,804,848 ("the '848 patent") and U.S. Patent No. 7,389,554 ("the '554 patent"). The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainants request that the Commission institute an investigation and, after the investigation, issue a limited exclusion order and cease and desist orders.

ADDRESSES: The complaint, except for any confidential information contained therein, is available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Room 112, Washington, DC 20436, telephone (202) 205–2000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the

Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: The Office of Docket Services, U.S. International Trade Commission, telephone (202) 205–1802.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2015).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on May 17, 2016, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States or the sale within the United States after importation of certain air mattress bed systems and components thereof by reason of infringement of one or more of claims 1, 5, 6, 16, 19, 20, 22, 24, and 26 of the '554 patent and claims 1, 3–6, 10, 14, and 24 of the '848 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainants are:

Select Comfort Corporation, 9800 59th Avenue North, Minneapolis, MN 55442
Select Comfort SC Corporation, 103 Shaw Street, Greenville, SC 29609

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

American National Manufacturing Inc., 252 Mariah Circle, Corona, CA 92879
Elements of Rest Inc., 1000 Marietta Street, Suite 106, Atlanta, GA 30318
Responsive Surface Technology LLC, 1000 Marietta Street, Suite 106, Atlanta, GA 30318
Dires LLC d/b/a Personal Comfort Bed, 3411 Lake Breeze Drive, Building 601, Suite E/F, Orlando, FL 32808

(3) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

The Office of Unfair Import Investigations will not participate as a party in this investigation.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: May 18, 2016.

Lisa R. Barton,
Secretary to the Commission.

[FR Doc. 2016–12074 Filed 5–20–16; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–298 (Fourth Review)]

Porcelain-On-Steel Cooking Ware From China; Scheduling of an Expedited Five-Year Review

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the scheduling of an expedited review pursuant to the Tariff Act of 1930 ("the Act") to determine whether revocation of the antidumping duty order on porcelain-on-steel cooking ware from China would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.

DATES: Effective May 6, 2016.

FOR FURTHER INFORMATION CONTACT: Keysha Martinez (202–205–2136), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this review may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—On May 6, 2016, the Commission determined that the domestic interested party group response to its notice of institution (81 FR 5133, February 1, 2016) of the subject five-year review was adequate and that the respondent interested party group response was inadequate. The Commission did not find any other circumstances that would warrant conducting a full review.[1] Accordingly, the Commission determined that it would conduct an expedited review pursuant to section 751(c)(3) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(3)).

For further information concerning the conduct of this review and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

Staff report.—A staff report containing information concerning the subject matter of the review will be placed in the nonpublic record on June 2, 2016, and made available to persons on the Administrative Protective Order service list for this review. A public version will be issued thereafter, pursuant to section 207.62(d)(4) of the Commission's rules.

Written submissions.—As provided in section 207.62(d) of the Commission's rules, interested parties that are parties to the review and that have provided individually adequate responses to the notice of institution,[2] and any party other than an interested party to the review may file written comments with the Secretary on what determination the

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[1] A record of the Commissioners' votes, the Commission's statement on adequacy, and any individual Commissioner's statements will be available from the Office of the Secretary and at the Commission's Web site.

[2] The Commission has found the response submitted by Columbian Home Products, LLC to be individually adequate. Comments from other interested parties will not be accepted (*see* 19 CFR 207.62(d)(2)).

Commission should reach in the review. Comments are due on or before June 7, 2016 and may not contain new factual information. Any person that is neither a party to the five-year review nor an interested party may submit a brief written statement (which shall not contain any new factual information) pertinent to the review by June 7, 2016. However, should the Department of Commerce extend the time limit for its completion of the final results of its review, the deadline for comments (which may not contain new factual information) on Commerce's final results is three business days after the issuance of Commerce's results. If comments contain business proprietary information (BPI), they must conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules with respect to filing were revised effective July 25, 2014. *See* 79 FR 35920 (June 25, 2014), and the revised Commission Handbook on E-filing, available from the Commission's Web site at *http://edis.usitc.gov.*

In accordance with sections 201.16(c) and 207.3 of the rules, each document filed by a party to the review must be served on all other parties to the review (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Determination.—The Commission has determined these reviews are extraordinarily complicated and therefore has determined to exercise its authority to extend the review period by up to 90 days pursuant to 19 U.S.C. 1675(c)(5)(B).

Authority: This review is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

By order of the Commission.

Issued: May 17, 2016.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2016–12024 Filed 5–20–16; 8:45 am]

BILLING CODE P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1071 (Second Review)]

Alloy Magnesium From China; Scheduling of an Expedited Five-Year Review

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the scheduling of an expedited review pursuant to the Tariff Act of 1930 ("the Act") to determine whether revocation of the antidumping duty order on alloy magnesium from China would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.

DATES: *Effective Date:* May 6, 2016.

FOR FURTHER INFORMATION CONTACT: Edward Petronzio ((202) 205–3176), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*http://www.usitc.gov*). The public record for this review may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—On May 6, 2016, the Commission determined that the domestic interested party group response to its notice of institution (81 FR 5136, February 1, 2016) of the subject five-year review was adequate and that the respondent interested party group response was inadequate. The Commission did not find any other circumstances that would warrant conducting a full review.[1] Accordingly, the Commission determined that it would conduct an expedited review pursuant to section 751(c)(3) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(3)).[2]

For further information concerning the conduct of this review and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

Staff report.—A staff report containing information concerning the subject matter of the review will be placed in the nonpublic record on June 2, 2016, and made available to persons on the Administrative Protective Order service list for this review. A public version will be issued thereafter, pursuant to section 207.62(d)(4) of the Commission's rules.

Written submissions.—As provided in section 207.62(d) of the Commission's rules, interested parties that are parties to the review and that have provided individually adequate responses to the notice of institution,[3] and any party other than an interested party to the review may file written comments with the Secretary on what determination the Commission should reach in the review. Comments are due on or before June 7, 2016 and may not contain new factual information. Any person that is neither a party to the five-year review nor an interested party may submit a brief written statement (which shall not contain any new factual information) pertinent to the review by June 7, 2016. However, should the Department of Commerce extend the time limit for its completion of the final results of its review, the deadline for comments (which may not contain new factual information) on Commerce's final results is three business days after the issuance of Commerce's results. If comments contain business proprietary information (BPI), they must conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules with respect to filing were revised effective July 25, 2014. *See* 79 FR 35920 (June 25, 2014), and the revised Commission Handbook on E-filing, available from the Commission's Web site at *http://edis.usitc.gov.*

In accordance with sections 201.16(c) and 207.3 of the rules, each document filed by a party to the review must be served on all other parties to the review (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: This review is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

By order of the Commission.

Issued: May 17, 2016.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2016–12021 Filed 5–20–16; 8:45 am]

BILLING CODE 7020–02–P

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[1] A record of the Commissioners' votes, the Commission's statement on adequacy, and any individual Commissioner's statements will be available from the Office of the Secretary and at the Commission's Web site.

[2] Vice Chairman Dean A. Pinkert did not participate in the adequacy determination.

[3] The Commission has found the responses submitted by US Magnesium and The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 8319 to be individually adequate. Comments from other interested parties will not be accepted (*see* 19 CFR 207.62(d)(2)).

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Personal Protective Equipment for Shipyard Employment

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Occupational Safety and Health Administration (OSHA) sponsored information collection request (ICR) titled, "Personal Protective Equipment for Shipyard Employment," to the Office of Management and Budget (OMB) for review and approval for continued use, without change, in accordance with the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.* Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before June 22, 2016.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden, may be obtained free of charge from the *RegInfo.gov* Web site at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201602-1218-001* (this link will only become active on the day following publication of this notice) or by contacting Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or by email at *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–OSHA, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202–395–5806 (this is not a toll-free number); or by email: *OIRA_submission@omb.eop.gov.* Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov.*

FOR FURTHER INFORMATION CONTACT: Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: This ICR seeks to extend PRA authority for the Personal Protective Equipment (PPE) for Shipyard Employment information collection requirements codified in regulations 29 CFR part 1915, subpart I that requires an Occupational Safety Health Act (OSH Act) covered employer subject to the PPE for Shipyard Employment Standard to provide and to ensure that each affected employee uses the appropriate PPE for the eyes, face, head, extremities, torso, and respiratory system whenever the worker is exposed to hazards that require the use of PPE. Such equipment includes protective clothing, protective shields, protective barriers, life-saving equipment, personal fall arrest systems, and positioning device systems that meet the applicable provisions of the subpart. This ICR covers hazard assessment and verification records and record disclosure during inspections. OSH Act sections 2(b)(9), 6, and 8(c) authorize this information collection. *See* 29 U.S.C. 651(b)(9), 655, and 657(c).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1218–0215.

OMB authorization for an ICR cannot be for more than three (3) years without renewal, and the current approval for this collection is scheduled to expire on May 31, 2016. The DOL seeks to extend PRA authorization for this information collection for three (3) more years, without any change to existing requirements. The DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on December 10, 2015 (80 FR 76712).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1218–0215. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Agency: DOL–OSHA.

Title of Collection: Personal Protective Equipment for Shipyard Employment.

OMB Control Number: 1218–0215.

Affected Public: Private Sector—businesses or other for profits.

Total Estimated Number of Respondents: 2,759.

Total Estimated Number of Responses: 2,089.

Total Estimated Annual Time Burden: 172 hours.

Total Estimated Annual Other Costs Burden: $0.

Authority: 44 U.S.C. 3507(a)(1)(D).

Dated: May 16, 2016.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2016–12019 Filed 5–20–16; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Multiple Worksite Report and Report of Federal Employment and Wages

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Bureau of Labor Statistics (BLS) sponsored information collection request (ICR) titled, "Multiple Worksite Report and Report of Federal Employment and Wages," to the Office of Management and Budget (OMB) for review and approval for continued use, without change, in accordance with the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.* Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that agency receives on or before June 22, 2016.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201601-1220-001* (this link will only become active on the day following publication of this notice) or by contacting Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or by email at *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request by mail or courier to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–BLS, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202–395–5806 (this is not a toll-free number); or by email: *OIRA_submission@omb.eop.gov.* Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov.*

FOR FURTHER INFORMATION CONTACT: Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: This ICR seeks to extend PRA authority for the Multiple Worksite Report and Report of Federal Employment and Wages information collection. States use the Multiple Worksite Report to collect employment and wages data from non-Federal businesses engaged in multiple operations within a State and subject to State Unemployment Insurance laws. The Report of Federal Employment and Wages is designed for Federal establishments covered under the Unemployment Compensation for Federal Employees program. These data are used for sampling, benchmarking, and economic analysis. BLS Authorizing Statute sections 1 and 2 and Social Security Act section 303 authorize this information collection. *See* 29 U.S.C. 1, 2; 42 U.S.C. 503.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1220–0134.

OMB authorization for an ICR cannot be for more than three (3) years without renewal, and the current approval for this collection is scheduled to expire on May 31, 2016. The DOL seeks to extend PRA authorization for this information collection for three (3) more years, without any change to existing requirements. The DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on December 18, 2015 (80 FR 79100).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1220–0134. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Agency: DOL–BLS.

Title of Collection: Multiple Worksite Report and Report of Federal Employment and Wages.

OMB Control Number: 1220–0134.

Affected Public: Federal Government and Private Sector—businesses or other for-profits and not-for-profit institutions.

Total Estimated Number of Respondents: 142,554.

Total Estimated Number of Responses: 570,216.

Total Estimated Annual Time Burden: 210,980 hours.

Total Estimated Annual Other Costs Burden: $0.

Authority: 44 U.S.C. 3507(a)(1)(D).

Dated: May 16, 2016.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2016–12080 Filed 5–20–16; 8:45 am]

BILLING CODE 4510–24–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Office of Procurement; Public Availability of NASA FY 2015 Service Contract Inventory

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice.

SUMMARY: In accordance with Section 743 of Division C of the Consolidated Appropriations Act of 2010 (Pub. L. 111–117), the National Aeronautics and Space Administration (NASA) is publishing this notice to advise the public of the availability of its Service Contract Inventory for Fiscal Year (FY) 2015. This inventory provides information on service contract actions over $25,000 that were awarded in FY 2015. The inventory has been developed in accordance with guidance issued by the Office of Management and Budget's Office of Federal Procurement Policy. NASA has posted documents associated with the Service Contract inventory, on the NASA Office of Procurement homepage at the following link: *http://www.hq.nasa.gov/office/procurement/scinventory/index.html.*

FOR FURTHER INFORMATION CONTACT: Jamiel L. Charlton at (202) 358–0302 or *Jamiel.L.Charlton@nasa.gov.*

Manuel Quinones,

Federal Register Liaison.

[FR Doc. 2016–12144 Filed 5–20–16; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL SCIENCE FOUNDATION

Notice of Intent To Prepare an Environmental Impact Statement and Initiate Section 106 Consultation for Proposed Changes to Arecibo Observatory Operations, Arecibo, Puerto Rico and Notice of Public Scoping Meetings and Comment Period

AGENCY: National Science Foundation.

ACTION: Notice of intent to prepare an Environmental Impact Statement and initiate Section 106 consultation for proposed changes to Arecibo Observatory operations, Arecibo, Puerto Rico and notice of public scoping meetings and comment period.

SUMMARY: In compliance with the National Environmental Policy Act of 1969, as amended, the National Science Foundation (NSF) intends to prepare an Environmental Impact Statement (EIS) to evaluate potential environmental effects of proposed changes to operations at Arecibo Observatory, in Arecibo, Puerto Rico. (See supplementary information below for more detail.) By this notice, NSF is announcing the beginning of the scoping process to solicit public comments and identify issues to be analyzed in the EIS. NSF also intends to initiate consultation under Section 106 of the National Historic Preservation Act to evaluate potential effects to the Arecibo Observatory, which is a historic property listed in the National Register of Historic Places.

DATES: This notice initiates the public scoping process for the EIS and the initiation of public involvement under Section 106 per 36 CFR 800.2(d). Comments on issues may be submitted verbally during scoping meetings scheduled for June 7, 2016 (see details below) or in writing until June 23, 2016. To be eligible for inclusion in the Draft EIS, all comments must be received prior to the close of the scoping period. NSF will provide additional opportunities for public participation upon publication of the Draft EIS.

ADDRESSES: You may submit comments related to this proposal by either of the following methods:

- *Email to: envcomp-AST@nsf.gov,* with subject line "Arecibo Observatory."
- *Mail to:* Ms. Elizabeth Pentecost, RE: Arecibo Observatory, National Science Foundation, Suite 1045, 4201 Wilson Blvd., Arlington, VA 22230.

Scoping Meetings: NSF will host two public scoping meetings.

- *Daytime meeting:* June 7, 2016, at 9:30 a.m. to 11:30 a.m., DoubleTree by Hilton San Juan, 105 Avenida De Diego, San Juan, PR, Phone: (787) 721–6500.
- *Evening meeting:* June 7, 2016, 6:00 p.m. to 8:00 p.m., Colegio de Ingenieros y Agrimensores de Puerto Rico/Puerto Rico Professional College of Engineers and Land Surveyors (Arecibo Chapter), Ave. Manuel T. Guillán Urdáz, Conector 129 Carr. 10, Arecibo, Puerto Rico, Phone: (787) 758–2250.

Comments will be transcribed by a court reporter. Spanish language translation will be provided for simultaneous translation of presentations. Please contact NSF at least one week in advance of the meeting if you would like to request special accommodations (*i.e.,* sign language interpretation, etc.).

FOR FURTHER INFORMATION CONTACT: For further information regarding the EIS process or Section 106 consultation, please contact: Ms. Elizabeth Pentecost, National Science Foundation, Division of Astronomical Sciences, Suite 1045, 4201 Wilson Blvd., Arlington, VA 22230; telephone: (703) 292–4907; email: *epenteco@nsf.gov.*

SUPPLEMENTARY INFORMATION: The Arecibo Observatory is an NSF-owned scientific research and education facility located in Puerto Rico. In 2011, NSF awarded a five-year Cooperative Agreement to SRI International (SRI), which together with Universities Space Research Association (USRA) and Universidad Metropolitana (UMET) have formed the Arecibo Management Team to operate and maintain the Arecibo Observatory for the benefit of research communities. Arecibo Observatory enables research in three scientific disciplines: Space and atmospheric sciences, radio astronomy, and solar system radar studies; the last of these is largely funded through a research award to USRA from the National Aeronautics and Space Administration. An education and public outreach program complements the Arecibo Observatory scientific program. A key component of the Arecibo Observatory research facility is a 305-meter diameter, fixed, spherical reflector. Arecibo Observatory infrastructure includes instrumentation for radio and radar astronomy, ionospheric physics, office and laboratory buildings, a heavily utilized visitor and education facility, and lodging facilities for visiting scientists.

Through a series of academic community-based reviews, NSF has identified the need to divest several facilities from its portfolio in order to retain the balance of capabilities needed to deliver the best performance on the key science of the present decade and beyond. In 2012, NSF's Division of Astronomical Sciences' (AST's) portfolio review committee recommended that "continued AST involvement in Arecibo . . . be re-evaluated later in the decade in light of the science opportunities and budget forecasts at that time." In 2016, NSF's Division of Atmospheric and Geospace Sciences' (AGS') portfolio review committee recommended significantly decreasing funding for the Space and Atmospheric Sciences portion of the Arecibo mission. In response to these evolving recommendations, in 2016, NSF completed a feasibility study to inform and define options for the observatory's future disposition that would involve significantly decreasing or eliminating NSF funding of Arecibo. Concurrently, NSF sought viable concepts of operations from the scientific community via a Dear Colleague Letter NSF 16–005 (see *www.nsf.gov/AST*), with responses due by January 15, 2016. Alternatives to be evaluated in the EIS will be refined through continued public input, with preliminary alternatives that include the following:

- Continued NSF investment for science-focused operations (No-Action Alternative)
- Collaboration with interested parties for continued science-focused operations
- Collaboration with interested parties for transition to education-focused operations
- Mothballing of facilities (suspension of operations in a manner such that operations could resume efficiently at some future date)
- Deconstruction and site restoration

The purpose of the public scoping process is to determine relevant issues that will influence the scope of the environmental analysis, including identification of viable alternatives, and guide the process for developing the EIS. At present, NSF has identified the following preliminary resource areas for analysis of potential impacts: Air quality, biological resources, cultural resources, geological resources, solid waste generation, health and safety, socioeconomics, traffic, and groundwater resources. NSF will consult under Section 106 of the National Historic Preservation Act and Section 7 of the Endangered Species Act in coordination with this EIS process, as appropriate. Federal, state, and local agencies, along with other stakeholders that may be interested or affected by NSF's decision on this proposal are invited to participate in the scoping process and, if eligible, may request to participate as a cooperating agency.

Proposal Information: Information will be posted, throughout the EIS process, at *www.nsf.gov/AST.*

Dated: May 18, 2016.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2016–12036 Filed 5–20–16; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–445, 50–446, and 72–74; License Nos. NPF–87 and NPF–89; NRC–2016–0020]

In the Matter of Luminant Generation Company LLC; Comanche Peak Nuclear Power Plant, Unit Nos. 1 and 2, and Independent Spent Fuel Storage Installation Facility

AGENCY: Nuclear Regulatory Commission.

ACTION: Direct and indirect transfer of license; order.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing an order approving the direct transfer of ownership and indirect transfer of control of Facility Operating License (FOL) Nos. NPF–87 and NPF–89 and the general license for the independent spent fuel storage installation facility from the current holder, Luminant Generation Company LLC, to as-yet unnamed companies, herein identified as Comanche Peak LLC, as owner, and Operating Company LLC, as operator. The NRC will issue conforming amendments to the FOLs for administrative purposes to reflect the proposed license transfer. No physical changes to the facility or operational changes were proposed in the application. The Order is effective upon issuance.

DATES: The Order was issued on May 6, 2016, and is effective for 1 year.

ADDRESSES: Please refer to Docket ID NRC–2016–0020 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2016–0020. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select "*ADAMS Public Documents*" and then select "*Begin Web-based ADAMS Search.*" For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this document (if that document is available in ADAMS) is provided the first time that a document is referenced. The Order was issued to the licensee in a letter dated May 6, 2016 (ADAMS Accession No. ML16096A266).
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Margaret Watford, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–1233, email: *Margaret.Watford@nrc.gov.*

SUPPLEMENTARY INFORMATION: The text of the Order is attached.

Dated at Rockville, Maryland, this 16th day of May 2016.

For the Nuclear Regulatory Commission.

Margaret M. Watford,

Project Manager, Plant Licensing Branch IV–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

Attachment—Order Approving Transfer of Licenses and Approving Conforming Amendments

United States of America

Nuclear Regulatory Commission

In the Matter of Luminant Generation Company LLC; Comanche Peak Nuclear Power Plant, Unit Nos. 1 and 2

Dockets Nos. 50–445 and 50–446
License Nos. NPF–87 and NPF–89

Order Approving the Transfer of Licenses and Approving Conforming Amendments

I.

Luminant Generation Company LLC (Luminant Power, the licensee) is the holder of the Facility Operating License (FOL) Nos. NPF–87 and NPF–89 of the Comanche Peak Nuclear Power Plant, Unit Nos. 1 and 2 (CPNPP), and the holder of the general license for the independent spent fuel storage installation (ISFSI) facility. CPNPP is located in Somervell County, Texas.

II.

Pursuant to Section 184 of the Atomic Energy Act of 1954, as amended (the Act), and Title 10 of the *Code of Federal Regulations* (10 CFR), Section 50.80, "Transfer of licenses," Luminant Generation Company LLC (Luminant Power) requested that the U.S. Nuclear Regulatory Commission (NRC) consent to the transfer of the FOL Nos. NPF–87 and NPF–89 for CPNPP, and the general license for the ISFSI facility (Docket No. 72–74) from the current holder, Luminant Power, to as-yet unnamed companies, herein identified as Comanche Peak LLC (CP LLC), as owner, and Operating Company LLC (OpCo LLC), as operator (together these entities are referred to as "the licensees"). Luminant Power submitted the request by application dated November 12, 2015 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML15320A093), as supplemented by letters dated December 9, 2015, and March 14, March 29, April 7, and April 20, 2016 (ADAMS Accession Nos. ML15345A048, ML16076A162, ML16091A121, ML16099A291, and ML16112A396, respectively).

Luminant Power is acting on behalf of itself and the future to-be-formed companies. These future to-be-formed companies include the ultimate parent of CP LLC and OpCo LLC, Reorganized Texas Competitive Electric Holdings Corporation (Reorganized TCEH), and the intermediate parents, Intermediate Holding Company LLC, Asset Company LLC, and Preferred Stock Company Corporation (together with Luminant Power these entities are referred to as the "Applicants"). Entity names in the licensee's application and supplements are placeholders.

On April 29, 2014, Luminant Power notified the NRC of its filing of a bankruptcy (ADAMS Accession No. ML14120A212). Luminant Power is owned by Energy Future Competitive Holdings Company LLC (EFCH), through its wholly owned subsidiaries. The EFCH is a direct wholly owned subsidiary of Energy Future Holdings Corporation (EFH). The current and intended ownership structure of the facility is depicted in the simplified organizational charts provided in Exhibits A and B of Enclosure 1 in the submittal dated November 12, 2015. As a result of the proposed transactions and consistent with Exhibit B, EFH and EFCH will no longer ultimately own CPNPP. The licenses will be transferred from Luminant Power to CP LLC, responsible for ownership of the facility, and OpCo LLC, responsible for the operation and maintenance of CPNPP. At the emergence from bankruptcy, Reorganized TCEH, the ultimate parent company of CP LLC, will be owned by a numerous and diverse set of independent and unaffiliated stockholders. No single entity is expected to own a majority of, or exercise control over Reorganized TCEH or its Board of Directors. Current Luminant Power nuclear management and technical personnel will be employed by OpCo LLC. Accordingly, there will be no change in management or technical qualification, and OpCo LLC will continue to be technically qualified to operate the facility. No physical changes to the CPNPP and ISFSI facility or operational changes are proposed in the application.

The transfer of the licenses includes elements of both a direct and indirect transfer. The transfer of ownership is a direct transfer because ownership is changing from one entity to another new and different entity. Ownership is being transferred from Luminant Power to a new company, CP LLC. The transfer of operations is an indirect transfer because the operator is not changing; it is being absorbed into another entity (OpCo LLC), and the operator's parent companies are changing. Luminant Power's parent companies are currently Luminant Holding Company LLC and its parent, Texas Competitive Electric Holdings Company LLC. These companies will cease to exist and in their place, new companies—Intermediate Holding Company LLC and its parent, Reorganized TCEH—will be created. The operator will change to the extent that its name will change from Luminant Power to OpCo LLC; however, the management and technical personnel of the facility will not change. The change of the parent company of a licensed entity is considered an indirect transfer of control of the operating licenses.

Approval of the transfer of the facility operating licenses and conforming license amendments was requested by the Applicants pursuant to 10 CFR 50.80 and 10 CFR 50.90, "Application for amendment of license, construction permit, or early site permit." A notice entitled, "Comanche Peak Nuclear Power Plant, Units 1 and 2, and Independent Spent Fuel Storage Installation; Consideration of Approval of Transfer of Licenses and Conforming Amendments," was published in the **Federal Register** on February 8, 2016 (81 FR 6545). The NRC received no comments or hearing requests.

Under 10 CFR 50.80, no license, or any right thereunder, shall be transferred, directly or indirectly, through transfer of control of the license, unless the NRC shall give its consent in writing. Upon review of the information in the licensee's application, and other information before the Commission, the NRC staff has determined that the Applicants are qualified to hold the licenses to the extent proposed to permit the transfer of Luminant Power as possessor, owner, and operator. It also concludes that the transfer of the licenses are otherwise consistent with the applicable provisions of law, regulations, and orders issued by the NRC, pursuant thereto, subject to the conditions set forth below. The NRC staff has further found that the application for the proposed license amendments complies with the standards and requirements of the Atomic Energy Act of 1954, as amended, and the Commission's rules and regulations set forth in 10 CFR Chapter I; the facilities will operate in conformity with the application, the provisions of the Act and the rules and regulations of the Commission; there is reasonable assurance that the activities authorized by the proposed license amendments can be conducted without endangering the health and safety of the public and that such activities will be conducted in compliance with the Commission's regulations; the issuance of the proposed license amendments will not be inimical to the common defense and security or to the health and safety of the public; and the issuance of the proposed amendments will be in accordance with 10 CFR part 51 of the Commission's regulations and all applicable requirements have been satisfied. The findings set forth above are supported by a safety evaluation dated May 6, 2016 (ADAMS Accession No. ML16096A266).

III.

Accordingly, pursuant to Sections 161b, 161i, 161o, and 184 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2201(b), 2201(i), 2201(o), and 2234; and 10 CFR 50.80, IT IS HEREBY ORDERED that the application regarding the direct transfer of ownership and the indirect transfer of control of the licenses is approved, subject to the following conditions:

1. The licensees must notify the NRC of the names of the directors and principal officers of Reorganized TCEH and any other changes to these positions that occur before emergence from bankruptcy as soon as they have been identified, but no later than 7 days before implementation of the transfer. Additional changes to these positions may occur post-emergence. The Applicants will notify the NRC no later than 120 days after the transfer of any changes in these personnel made during the first 90 days following emergence from bankruptcy.

2. Following the subject transfer of control of the licenses, all of the directors of CP LLC and OpCo LLC who can vote on activities governed by the CPNPP licenses and all of the officers of CP LLC and OpCo LLC with direct responsibility for activities governed by the CPNPP licenses shall (1) be U.S. citizens and not appointed by a foreign entity and (2) have exclusive authority to ensure and shall ensure that the business and activities of OpCo LLC and CP LLC with respect to the CPNPP licenses is at all times conducted in a manner consistent with the public health and safety and common defense and security of the United States.

3. The Reorganized TCEH Board of Directors shall adopt resolutions that any non-U.S. citizens or foreign-appointed U.S. citizens serving as either directors or executive officers of Reorganized TCEH, the ultimate parent, and intermediate parents of CP LLC and OpCo LLC shall not seek access to any classified information or to special nuclear material in the custody of the CPNPP licensees and shall not participate in or seek to influence operational decisions by the licensees regarding nuclear safety or security matters.

4. CP LLC and OpCo LLC shall provide satisfactory documentary evidence to the Director of the Office of Nuclear Reactor Regulation that, as of the date of the license transfer, the licensees reflected in the amended licenses have obtained the appropriate amount of insurance required of a licensee under 10 CFR part 140 and 10C FR 50.54(w).

IT IS FURTHER ORDERED that after receipt of all required regulatory approvals of the proposed transfer action, Luminant Power shall inform the Director of the Office of Nuclear Reactor Regulation in writing of such receipt within 5 business days, and of the date of the closing of the direct transfer no later than 7 business days before the date of the closing. Should the proposed transfer not be completed within 1 year from the date of this order, this order shall become null and void, provided, however, upon written application and good cause shown, such date may be extended by order. The conditions of this order may be amended upon application by the licensee and approval by the Director of the Office of Nuclear Reactor Regulation.

IT IS FURTHER ORDERED that, consistent with 10 CFR 2.1315(b), license amendments that make changes, as indicated in Enclosure 2 to the cover letter forwarding this order, to conform the licenses to reflect the subject transfer are approved. The amendments will be revised only to reflect the final company names (yet to be decided), and shall be issued and made effective at the time the proposed license transfer is completed.

This order is effective upon issuance.

For further details with respect to this order, see the initial application dated November 12, 2015, as supplemented by letters dated December 9, 2015, and March 14, March 29, April 7, and April 20, 2016, and the safety evaluation dated the same date as this order, which are available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area 01 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available documents created or received at the NRC are accessible electronically through ADAMS in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR reference staff by telephone at 1–800–397–4209, or 301–415–4737, or by email to *pdr.resource@nrc.gov.*

Dated at Rockville, Maryland this 6th day of May 2016.

For the Nuclear Regulatory Commission.

Michele G. Evans,

Acting Director, Office of Nuclear Reactor Regulation.

[FR Doc. 2016–12051 Filed 5–20–16; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–272 and 50–311; NRC–2016–0102]

PSEG Nuclear LLC; Salem Nuclear Generating Station, Unit Nos. 1 and 2

AGENCY: Nuclear Regulatory Commission.

ACTION: License amendment application; opportunity to comment, request a hearing, and petition for leave to intervene.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of amendments to Facility Operating License Nos. DPR–70 and 75, issued to PSEG Nuclear LLC (PSEG or the licensee) for operation of the Salem

Nuclear Generating Station (Salem), Unit Nos. 1 and 2. The proposed amendments would extend the implementation period for Salem, Unit No. 1, License Amendment No. 311, and Salem, Unit No. 2, License Amendment No. 292, from July 5, 2016 (120 days from the March 7, 2016, date of issuance of the amendments), to prior to Mode 6 entry for the Salem, Unit No. 1, fall 2017 (1R25) outage and prior to Mode 6 entry for the Salem, Unit No. 2, spring 2017 (2R22) outage to align with the outages for the replacement of the source range and intermediate range detectors.

DATES: Submit comments by June 22, 2016. Requests for a hearing or petition for leave to intervene must be filed by July 22, 2016.

ADDRESSES: You may submit comments by any of the following methods (unless this document describes a different method for submitting comments on a specific subject):

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2016–0102. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* Cindy Bladey, Office of Administration, Mail Stop: OWFN–12–H08, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

For additional direction on obtaining information and submitting comments, see "Obtaining Information and Submitting Comments" in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Thomas J. Wengert, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–4037, email: *Thomas.Wengert@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2016–0102 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2016–0102.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select "*ADAMS Public Documents*" and then select "*Begin Web-based ADAMS Search.*" For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in the **SUPPLEMENTARY INFORMATION** section of this document.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2016–0102 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC posts all comment submissions at *http://www.regulations.gov* as well as entering the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment submissions into ADAMS.

II. Introduction

The NRC is considering issuance of amendments to Facility Operating License Nos. DPR–70 and 75, issued to PSEG Nuclear LLC for operation of Salem, Unit Nos. 1 and 2, located in Salem County, New Jersey.

The proposed amendments would extend the implementation period for Salem, Unit No. 1, License Amendment No. 311, and Salem, Unit No. 2, License Amendment No. 292, from July 5, 2016 (120 days from March 7, 2016, date of issuance of the amendments), to prior to Mode 6 entry for the Salem, Unit No. 1, fall 2017 (1R25) outage and prior to Mode 6 entry for the Salem, Unit No. 2, spring 2017 (2R22) outage to align with the outages for the replacement of the source range and intermediate range detectors.

Before any issuance of the proposed license amendments, the NRC will need to make the findings required by the Atomic Energy Act of 1954, as amended (the Act), and the NRC's regulations.

The NRC has made a proposed determination that the license amendment request involves no significant hazards consideration. Under the NRC's regulations in § 50.92 of title 10 of the *Code of Federal Regulations* (10 CFR), this means that operation of the facility in accordance with the proposed amendments would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

> 1. Do the proposed changes involve a significant increase in the probability or consequences of an accident previously evaluated?
>
> Response: No.
>
> The proposed amendment implementation schedule extension is administrative in nature and does not require any modifications to or change in operation of plant systems or components. The extension of the amendment implementation period does not increase the probability or consequences of an accident previously evaluated in the Updated Final Safety Analysis (UFSAR). Current Technical Specification (TS) 3.9.2 requirements will continue to ensure the plant is operated consistent with the UFSAR accident analysis for a boron dilution event.
>
> Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.
>
> 2. Do the proposed changes create the possibility of a new or different kind of accident from any accident previously evaluated?
>
> Response: No.
>
> The proposed amendment implementation schedule extension is administrative in nature. The extension of the amendment implementation does not require any physical plant modifications, does not alter any plant systems or components, and does not change the operation of the plant. Current TS 3.9.2 requirements will continue to ensure the plant is operated consistent with the UFSAR accident analysis for a boron dilution event.
>
> Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Do the proposed changes involve a significant reduction in a margin of safety?

Response: No.

Margin of safety is related to the confidence in the ability of the fission product barriers to perform their intended functions. These barriers include the fuel cladding, the reactor coolant system pressure boundary, and the containment. The proposed TS change is administrative in nature and does not affect any of these barriers. Current TS 3.9.2 requirements will continue to ensure the plant is operated consistent with the UFSAR accident analysis for a boron dilution event.

Therefore, the proposed change does not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the license amendment request involves a no significant hazards consideration.

The NRC is seeking public comments on this proposed determination that the license amendment request involves no significant hazards consideration. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendments until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendments before expiration of the 60-day notice period if the Commission concludes the amendments involve no significant hazards consideration. In addition, the Commission may issue the amendments prior to the expiration of the 30-day comment period if circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility. If the Commission takes action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. If the Commission makes a final no significant hazards consideration determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

III. Opportunity To Request a Hearing and Petition for Leave To Intervene

Within 60 days after the date of publication of this notice, any person(s) whose interest may be affected by this action may file a request for a hearing and a petition to intervene with respect to issuance of the amendments to the subject facility operating licenses or combined license. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's "Agency Rules of Practice and Procedure" in 10 CFR part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the NRC's PDR, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. The NRC's regulations are accessible electronically from the NRC Library on the NRC's Web site at *http://www.nrc.gov/reading-rm/doc-collections/cfr/*. If a request for a hearing or petition for leave to intervene is filed within 60 days, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address, and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also set forth the specific contentions which the requestor/petitioner seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the requestor/petitioner shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the requestor/petitioner intends to rely in proving the contention at the hearing. The requestor/petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the requestor/petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendments under consideration. The contention must be one which, if proven, would entitle the requestor/petitioner to relief. A requestor/petitioner who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing with respect to resolution of that person's admitted contentions, including the opportunity to present evidence and to submit a cross-examination plan for cross-examination of witnesses, consistent with NRC regulations, policies and procedures.

Petitions for leave to intervene must be filed no later than 60 days from the date of publication of this notice. Requests for hearing, petitions for leave to intervene, and motions for leave to file new or amended contentions that are filed after the 60-day deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the three factors in 10 CFR 2.309(c)(1)(i)–(iii).

If a hearing is requested, and the Commission has not made a final determination on the issue of no significant hazards consideration, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendments and make them immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendments. If the final determination is that the amendment request involves a significant hazards consideration, then any hearing held would take place before the issuance of any amendments unless the Commission finds an imminent danger to the health or safety of the public, in which case it will issue an appropriate order or rule under 10 CFR part 2.

A State, local governmental body, Federally-recognized Indian Tribe, or agency thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(h)(1). The petition should state the nature and extent of the petitioner's interest in the proceeding. The petition should be submitted to the Commission by July 22, 2016. The petition must be filed in accordance with the filing instructions in the "Electronic Submissions (E-Filing)" section of this document, and should meet the requirements for petitions for leave to intervene set forth in this section, except that under § 2.309(h)(2) a State, local governmental body, or Federally-recognized Indian Tribe, or agency thereof does not need to address the standing requirements in 10 CFR 2.309(d) if the facility is located within its boundaries. A State, local governmental body, Federally-recognized Indian Tribe, or agency thereof may also have the opportunity to participate under 10 CFR 2.315(c).

If a hearing is granted, any person who does not wish, or is not qualified, to become a party to the proceeding may, in the discretion of the presiding officer, be permitted to make a limited appearance pursuant to the provisions of 10 CFR 2.315(a). A person making a limited appearance may make an oral or written statement of position on the issues, but may not otherwise participate in the proceeding. A limited appearance may be made at any session of the hearing or at any prehearing conference, subject to the limits and conditions as may be imposed by the presiding officer. Persons desiring to make a limited appearance are requested to inform the Secretary of the Commission by July 22, 2016.

IV. Electronic Submissions (E-Filing)

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC's E-Filing rule (72 FR 49139; August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the Internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *hearing.docket@nrc.gov,* or by telephone at 301–415–1677, to request (1) a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/getting-started.html.* System requirements for accessing the E-Submittal server are detailed in the NRC's "Guidance for Electronic Submission," which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through the Electronic Information Exchange System, users will be required to install a Web browser plug-in from the NRC's Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email notice confirming receipt of the document. The E-Filing system also distributes an email notice that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the "Contact Us" link located on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by email to *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866–672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket which is available to the public at *http://ehd1.nrc.gov/ehd/,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. However, in some instances, a request to intervene will require including information on local residence in order to demonstrate a proximity assertion of interest in the proceeding. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

For further details with respect to this action, see the application for license amendment dated May 10, 2016 (ADAMS Accession No. ML16131A555).

Attorney for licensee: Jeffrie J. Keenan, PSEG Nuclear LLC—N21, P.O. Box 236, Hancocks Bridge, NJ 08038.

NRC Branch Chief: Douglas A. Broaddus.

Dated at Rockville, Maryland, this 17th day of May 2016.

For the Nuclear Regulatory Commission.

Andrew Hon,

Acting Chief, Plant Licensing Branch I–2, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2016–12054 Filed 5–20–16; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS); Meeting of the ACRS Subcommittee on Planning and Procedures; Notice of Meeting

The ACRS Subcommittee on Planning and Procedures will hold a meeting on June 8, 2016, Room T–2B3, 11545 Rockville Pike, Rockville, Maryland.

The meeting will be open to public attendance with the exception of a portion that may be closed pursuant to 5 U.S.C. 552b(c)(2) and (6) to discuss organizational and personnel matters that relate solely to the internal personnel rules and practices of the ACRS, and information the release of which would constitute a clearly unwarranted invasion of personal privacy.

The agenda for the subject meeting shall be as follows:

Wednesday, June 8, 2016—12:00 p.m. Until 1:00 p.m.

The Subcommittee will discuss proposed ACRS activities and related matters. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Quynh Nguyen (Telephone 301–415–5844 or Email: *Quynh.Nguyen@nrc.gov*) five days prior to the meeting, if possible, so that arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 21, 2015 (80 FR 63846).

Information regarding changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with the DFO if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, MD. After registering with security, please contact Mr. Theron Brown (240–888–9835) to be escorted to the meeting room.

Dated: May 11, 2016.

Mark L. Banks,

Chief, Technical Support Branch, Advisory Committee on Reactor Safeguards.

[FR Doc. 2016–12052 Filed 5–20–16; 8:45 am]

BILLING CODE 7590–01–P=

NUCLEAR REGULATORY COMMISSION

[NRC–2015–0285]

Containment Shell or Liner Moisture Barrier Inspection

AGENCY: Nuclear Regulatory Commission.

ACTION: Regulatory issue summary; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing Regulatory Issue Summary (RIS) 2016–07, "Containment Shell or Liner Moisture Barrier Inspection." This RIS reiterates the NRC staff's position regarding American Society of Mechanical Engineers (ASME) code inservice inspection requirements for moisture barriers. The NRC's regulations require, in part, that licensees implement the inservice inspection program for pressure retaining components and their integral attachments of metal containments and metallic liners of concrete containments in accordance with the ASME Code. If a material prevents moisture from contacting inaccessible areas of the containment shell or liner, especially if the material is being relied upon in lieu of augmented examinations of a susceptible location, the material must be inspected as a moisture barrier. The applicable ASME Code sections require licensees to inspect 100 percent of accessible moisture barriers during each inspection period.

DATES: The RIS is available as of May 23, 2016.

ADDRESSES: Please refer to Docket ID NRC–2015–0285 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2015–0285. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select "*ADAMS Public Documents*" and then select "*Begin Web-based ADAMS*

Search." For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this document (if that document is available in ADAMS) is provided the first time that a document is referenced. This RIS is available under ADAMS Accession No. ML16068A436.

- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.
- This RIS is also available on the NRC's public Web site at *http://www.nrc.gov/reading-rm/doc-collections/gen-comm/reg-issues/* (select "2016" and then select "2016–07").

FOR FURTHER INFORMATION CONTACT: Bryce Lehman, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–1626; email: *Bryce.Lehman@nrc.gov.*

SUPPLEMENTARY INFORMATION: The NRC published a notice of opportunity for public comment on this RIS in the **Federal Register** (80 FR 80401) on December 24, 2015. The agency received comments from four commenters. The staff considered all comments, which resulted in minor revisions to the RIS. The evaluation of these comments and the resulting changes to the RIS are discussed in a publicly-available memorandum which is available in ADAMS under Accession No. ML16060A450.

Dated at Rockville, Maryland, this 17th day of May 2016.

For the Nuclear Regulatory Commission.

Sheldon D. Stuchell,

Chief, Generic Communications Branch, Division of Policy and Rulemaking, Office of Nuclear Reactor Regulation.

[FR Doc. 2016–12039 Filed 5–20–16; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–77846; File No. SR–BatsBZX–2016–18]

Self-Regulatory Organizations; Bats BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Rules 15.1(a) and (c) in Order To Implement a Tape B Quoting Tier

May 17, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on May 11, 2016, Bats BZX Exchange, Inc. (the "Exchange" or "BZX") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal to amend the fee schedule applicable to Members[3] and non-members of the Exchange pursuant to BZX Rules 15.1(a) and (c) in order to implement a Tape B Quoting Tier.

The text of the proposed rule change is available at the Exchange's Web site at *www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fee Schedule to adopt a new Tape B Quoting Tier in order to strengthen market quality in LMP Securities[4] and ETPs[5] more broadly, by providing an enhanced rebate in Tape B[6] securities to Members that meet certain minimum quoting standards in at least 50 LMP Securities. In particular, the Exchange proposes to adopt the new Tape B Quoting Tier under which all Members would be eligible to receive an additional $0.0001 for each share of added displayed liquidity in all Tape B securities if the Member is enrolled in at least 50 LMP Securities for which:[7] (i) The Member's NBBO Time[8] is at least 15% or NBBO Size Time[9] is at least 25%; and (ii) the Member's Displayed Size Time[10] is at least 90%.

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] A Member is defined as "any registered broker or dealer that has been admitted to membership in the Exchange." *See* Exchange Rule 1.5(n).

[4] As proposed, LMP Securities means a list of securities included in the Liquidity Management Program, the universe of which will be determined by the Exchange and published in a circular distributed to Members and on the Exchange's Web site. Such LMP Securities will include all Bats-listed ETPs and certain non-Bats-listed ETPs for which the Exchange wants to incentivize Members to provide enhanced market quality.

[5] For purposes of this filing, ETP means any security type defined in Exchange Rule 14.11.

[6] Tape B securities includes all securities listed on the Exchange, NYSE Arca, Inc., and NYSE MKT LLC.

[7] As proposed, a Member must be enrolled in at least 50 LMP Securities for which the Member meets proposed requirements (i) and (ii), as measured on a security by security basis, in order to qualify for the Tape B Quoting Tier. Where a Member is enrolled in 50 or more LMP Securities, but only meets proposed requirements (i) and (ii) in 49 or fewer of those LMP Securities, the Member will not qualify for the Tape B Quoting Tier.

[8] As proposed, NBBO Time means the average of the percentage of time during regular trading hours during which the Member maintains at least 100 shares at each of the NBB and NBO. As an example, where the Member maintains at least 100 shares at the NBB for 20% of the time during regular trading hours and at least 100 shares at the NBO for 10% of the time during regular trading hours, the Member's NBBO Time would be 15% ((.20 + .10)/2).

[9] As proposed, NBBO Size Time means the percentage of time during regular trading hours during which there are size-setting quotes at the NBBO on the Exchange. Stated another way, where the Exchange has size-setting quotes at the each of the NBB and NBO for any amount of time equal to or greater than 25% of regular trading hours, the proposed NBBO Size Time threshold will be met. A quote is a size-setting quote where it is the largest quote at the NBB or NBO and remains a size-setting quote until and unless another quote is at a more aggressive price or at the same price with greater size. The Exchange notes that, unlike NBBO Time, which applies to a particular Member's quoting activity, NBBO Size Time is calculated based on all quoting activity on the Exchange. As an example, where the NBB is 10.00 as quoted by a single exchange with 500 shares and the Exchange then quotes 600 shares at 10.00, such quote is a size-setting quote until another exchange quotes 700 shares at 10.00 or quotes at a more aggressive price.

[10] As proposed, Displayed Size Time means the percentage of time during regular trading hours during which the Member maintains at least 2,500 displayed shares on the bid and separately maintains at least 2,500 displayed shares on the offer that are priced no more than 2% away from the NBB and NBO, respectively. Stated another way, where the Member maintains at least 2,500 displayed shares at or within 2% of the NBB and NBO on each of the bid and the offer, respectively, for any amount of time equal to or greater than 90% of regular trading hours, the Member will meet the proposed threshold. The Exchange notes that any displayed shares priced at or within 2% of the NBB or NBO (*e.g.* at multiple price levels) will be counted toward the 2,500 share requirement. As an example, where the NBBO is $10.00 by $10.01 all bid shares with a limit equal to or greater than $9.80 will be counted and any offer shares with a limit

As proposed, the Exchange will publish and update periodically via circular a list of LMP Securities in which all Members will be eligible to enroll.[11] All Members will be eligible to enroll in LMP Securities, there will be no limit to the number of LMP Securities in which a Member may enroll, and there will be no limit to the number of Members that can enroll in each LMP Security.[12] All Members enrolled in LMP Securities will be eligible for the additional rebate where the Member meets the Tape B Quoting Tier requirements.

In addition to the changes proposed above, the Exchange proposes to relocate the term "Qualified LMM" within the list of Definitions to its proper alphabetical placement.

Implementation Date

The Exchange proposes to implement these amendments to its fee schedule effective June 1, 2016.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6 of the Act.[13] Specifically, the Exchange believes that the proposed rule change is consistent with Section 6(b)(4) and 6(b)(5) of the Act,[14] in that it provides for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities. The proposed rule change reflects a competitive pricing structure designed to incent market participants to direct their order flow to the Exchange and enhance market quality in LMP Securities and in Tape B securities. The Exchange believes that the proposed tier is equitable and non-discriminatory in that it would apply uniformly to all Members, any Member may enroll in any LMP Security, and enrollment is a purely administrative process. The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive.

The Exchange believes that the proposed new tier is reasonable in that it will enhance market quality on the Exchange in two ways: (i) By incentivizing Members to meet certain quoting standards in LMP Securities designed to narrow spreads, increase size at the inside, and increase liquidity depth on the Exchange in such LMP Securities; and (ii) providing an additional rebate for all of a qualifying Member's orders that add liquidity in Tape B securities will incentivize Members to increase their participation on the Exchange in Tape B securities. The Exchange believes that the proposed quoting standards are reasonable because the NBBO Time and NBBO Size Time will either act to add additional liquidity at the NBBO in the LMP Securities or ensure that there is already significant size-setting quote activity on the Exchange in the LMP Securities and the Displayed Size Time will act to increase the depth of the market within 2% of the NBB and NBO for the vast majority of the trading day. The Exchange believes that such incentives will promote price discovery and market quality in such securities and, further, that the tightened spreads and increased liquidity from the proposal will benefit all investors by deepening the Exchange's liquidity pool, offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, enhancing quoting competition across exchanges, promoting market transparency, and improving investor protection. The Exchange also believes that including all Bats-listed ETPs as LMP Securities is equitable and not unfairly discriminatory because it will help to strengthen the Exchange's market quality for Bats-listed securities by enhancing the quality of quoting in such securities, which will further assist the Exchange in competing as a listing venue for issuers seeking to list ETPs. The Exchange also believes that including only certain non-Bats-listed ETPs as LMP Securities is equitable and not unfairly discriminatory because the Exchange has identified such non-Bats-listed ETPs as securities for which it would like to inject additional quoting competition, which it believes will generally act to narrow spreads, increase size at the inside, and increase liquidity depth in such securities. Accordingly, the Exchange believes that the proposal is reasonable, equitably allocated, and not unfairly discriminatory because it is consistent with the overall goals of enhancing market quality.

The Exchange notes that the proposed pricing structure is not dissimilar from volume-based rebates and fees ("Volume Tiers") that have been widely adopted by exchanges, including the Exchange, and are equitable and not unfairly discriminatory because they are open to all members on an equal basis and provide higher rebates and lower fees that are reasonably related to the value to an exchange's market quality. Much like Volume Tiers are generally designed to incentivize higher levels of liquidity provision and/or growth patterns on the Exchange, the proposal is designed to incentivize enhanced market quality on the Exchange through tighter spreads, greater size at the inside, and greater quoting depth in LMP Securities by offering an enhanced rebate in Tape B securities. Such enhanced rebate will simultaneously incentivize higher levels of liquidity provision in all Tape B securities. Where the NBBO Size Time is at least 25%, there is no minimum NBBO Time standard applicable to the Member, however, the Exchange believes that this is reasonable because where the NBBO Size Time is already at least 25%, a Member meeting the NBBO Time standard will not significantly enhance market quality at the NBBO for the product on the Exchange. The Exchange also notes that the Member must still have a Displayed Size Time of at least 90% to receive the enhanced rebate. As such, the Exchange believes that the proposed enhanced rebate will strengthen the Exchange's market quality for LMP Securities by enhancing the quality of quoting in such securities, as well as enhancing market quality in Tape B securities generally. Accordingly, the Exchange believes that the proposal will act to enhance liquidity and competition across exchanges in LMP Securities and enhance liquidity provision in Tape B securities on the Exchange by providing a rebate reasonably related to such enhanced market quality to the benefit of all investors, thereby promoting the

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equal to or less than $10.21 will be counted. Where the Member maintains at least 2,500 displayed shares at or within those thresholds on each of the bid and the offer for any amount of time equal to or greater than 90% of regular trading hours, the Member will meet the proposed threshold.

[11] The Exchange anticipates that the initial list of LMP Securities will include at least 175 ETPs, at least 80 of which will be Bats-listed securities. A current list of LMP Securities will be available on *www.batstrading.com,* which will be updated as new securities are added to the list of LMP Securities. A direct link to the list of LMP Securities will be included in the circular described above. All Bats-listed securities will be LMP Securities immediately upon listing on the Exchange. The Exchange will not remove a security from the list of LMP Securities without 30 days prior notice provided via circular.

[12] After executing a form notifying the Exchange of its intent to enroll in LMP Securities, a Member is eligible to enroll in LMP Securities daily through the Exchange's Web site. There is no approval or disapproval process associated with enrollment and execution of the form is solely for administrative purposes. All Members will be eligible to enroll in all LMP Securities after executing the form.

[13] 15 U.S.C. 78f.

[14] 15 U.S.C. 78f(b)(4) and (5).

principles discussed in Section 6(b)(5) of the Act.[15]

The Exchange also believes that the clarifying change to alphabetize the Definitions section of the fee schedule is reasonable, fair and equitable and non-discriminatory because it is non-substantive and is designed to make sure that the fee schedule is as clear and easily understandable as possible.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. The Exchange does not believe that the changes burden competition, but instead, enhance competition, as these changes are intended to increase the competitiveness of the Exchange as it is designed to draw additional volume to the Exchange. The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if the deem fee structures to be unreasonable or excessive. The proposed changes are generally intended to enhance the rebates in Tape B securities, which is intended to enhance market quality in LMP Securities and Tape B securities. As such, the proposal is a competitive proposal that is intended to add additional liquidity to the Exchange, which will, in turn, benefit the Exchange and all Exchange participants.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[16] and paragraph (f)(6) of Rule 19b–4 thereunder.[17]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative before 30 days from the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[18] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.

The Exchange has asked the Commission to waive the 30-day operative delay. The Exchange states that waiver of the 30-day operative delay will allow the Exchange to implement the proposal without delay on June 1, 2016, allowing market participants to potentially realize the benefits of the proposal. The Exchange further states that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest because it believes that the proposed rule change would promote enhanced market quality and serve as an additional safeguard against extreme price dislocation. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The Commission hereby waives the 30-day operative delay and designates the proposed rule change to be operative upon filing with the Commission.[19]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–BatsBZX–2016–18 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BatsBZX–2016–18. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BatsBZX–2016–18 and should be submitted on or before June 13, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–12013 Filed 5–20–16; 8:45 am]

BILLING CODE 8011–01–P

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[15] 15 U.S.C. 78f(b)(5).

[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[18] 17 CFR 240.19b–4(f)(6)(iii).

[19] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

[20] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–77844; File No. SR–FINRA–2016–015]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change Amending Rule 12904 (Awards) of the Code of Arbitration Procedure for Customer Disputes and Rule 13904 (Awards) of the Code of Arbitration Procedure for Industry Disputes To Permit Award Offsets in Arbitration

May 17, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act" or "Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on May 3, 2016, Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to amend Rule 12904 (Awards) of the Code of Arbitration Procedure for Customer Disputes ("Customer Code") and Rule 13904 (Awards) of the Code of Arbitration Procedure for Industry Disputes ("Industry Code") (together, "Codes") to provide that absent specification to the contrary in an award, when arbitrators order opposing parties to pay each other damages, the monetary awards shall offset, and the party that owes the larger amount shall pay the net difference.

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org*, at the principal office of FINRA and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Background

FINRA Rules 12904 and 13904 address awards issued by arbitrators at the FINRA Office of Dispute Resolution forum. They provide, among other matters, that awards must be in writing and signed by a majority of the arbitrators or as required by applicable law. The rules itemize required elements of awards, including a statement of the damages awarded, and provide that all monetary awards shall be paid within 30 days of receipt unless a motion to vacate has been filed in a court of competent jurisdiction.

Sometimes arbitrators order opposing parties in a case to pay each other monetary damages. When arbitrators make such awards, but do not specify whether the party that owes the higher amount must pay the net difference, the lack of clarity has resulted in parties asking arbitrators to revise an award after a case has closed or in post-award litigation. For example, arbitrators may award damages to a firm because an associated person failed to pay money owed on a promissory note and award a lesser amount to the associated person on a counterclaim. The firm is willing to accept the net payment due. However, if the arbitrators do not specify that awards should be offset, the firm may be required to pay the counterclaim even if the associated person refuses or is unable to pay the larger amount. The offset issue could also arise in customer cases, such as those involving margin account disputes. Currently, Rules 12904 and 13904 are silent on award offsets. Therefore, under the current Codes, FINRA does not require arbitrators to specify whether parties should offset amounts awarded.

For example, in *UBS Financial Services, Inc. (UBS)* v. *Thomas A. Mann (Mann),* No. 2:2014cv10621, 2014 WL 1746249 (E.D. Mich. Apr. 30, 2014), a federal district court heard a dispute relating to opposing awards made by a FINRA arbitration panel involving forgivable loans the firm made to Mann, an associated person. The arbitrators awarded UBS $217,000 and awarded Mann $150,000 for claims relating to his employment. *Mann,* 2014 WL 1746249 at *1. "UBS expressed concern it would never receive payment from Mann, but still had to pay him." *Id.* Under the current Codes, the failure of a firm or person registered with FINRA, such as UBS, to pay an award within 30 days could subject that firm or person to FINRA disciplinary action, including cancellation of membership for the firm or suspension of the firm or person. UBS filed a motion to the arbitrators to correct the award because it was ambiguous in not providing for an offset. *Id.* In that motion, UBS argued that the award should be $67,000 in its favor, which is the difference in the amount of the two awards. *Id.* The arbitrators declined the request. *Id.* UBS asked the court to provide for an offset of the awards. *Id.* at *2. The court confirmed the award without ordering an offset because the arbitrators had an opportunity to review UBS' request for an offset and chose not to address it in the award. *Id.* at *3.

Proposed Amendments to Rules 12904(j) and 13904(j)

FINRA is proposing to amend Rules 12904(j) and 13904(j) to provide that, absent specification to the contrary in an award, when arbitrators order opposing parties to pay each other damages, the monetary awards shall offset, and the party that owes the larger amount shall pay the net difference. FINRA is also proposing to replace the bullets in Rules 12904 and 13904 with numbers because forum users have indicated that for ease of citation, they would prefer that FINRA use numbers and letters instead of bullets.

As noted in Item 2 of this filing, if the Commission approves the proposed rule change, FINRA will announce the effective date of the proposed rule change in a *Regulatory Notice* to be published no later than 60 days following Commission approval. The effective date will be no later than 30 days following publication of the *Regulatory Notice* announcing Commission approval.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[3] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that providing a default in favor of offset when arbitrators fail to address the issue in an award would benefit forum users by eliminating ambiguity and reducing the risk of post-award disputes.

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78o–3(b)(6).

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. FINRA believes that the proposed rule change will mitigate the risk of failure to pay by an opposing party that may arise when multiple parties in a dispute are found to owe non-equivalent awards simultaneously. Creating a presumption that opposing award amounts will be offset will increase the likelihood that the arbitrators' purpose in issuing opposing awards would be carried out. In addition, the proposed rule would reduce instances where the party owed the greater net damages is required to make payment even if the opposing party fails to pay its damages. In addition, this proposed rule change would likely reduce legal expenses to the party owed greater damages by eliminating the need to apply for the reopening of the case or going to court to seek award offsets, or seek other redress.

The scope of cases affected by offsets is small in comparison to the number of cases handled at the forum, but forum users have asked FINRA to address the issue. During 2013 and 2014, a total of 8,375 cases were closed at the forum (predominantly by settlement or award). The majority of cases are settled before a hearing takes place. The offset issue had the potential to arise in 299 cases (just over 3.5% of cases) where there was a claim by both a claimant and a respondent, and the case was resolved by arbitrators at a hearing on the merits. In 17 cases (0.2% of cases), the arbitrators awarded monetary damages to both a claimant and a respondent, offering the opportunity for an offset.

Of these 17 cases, one involved a customer dispute in which a member initiated a claim for breach of contract. The arbitrators made a monetary award to both the customer and firm and provided for an offset. In the remaining 16 intra-industry cases, most of which involved promissory notes, the arbitrators made an award to both the firm and the associated person. In 8 of the 16 cases, the arbitrators ordered award offsets. In the remaining eight cases, the awards were silent as to offset.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–FINRA–2016–015 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2016–015. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549–1090, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FINRA–2016–015 and should be submitted on or before June 13, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[4]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–12012 Filed 5–20–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–77850; File No. SR–NYSE–2016–22]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Amendment No. 5 to Proposed Rule Change Adopting Initial and Continued Listing Standards for the Listing of Equity Investment Tracking Stocks and Adopting Listing Fees Specific to Equity Investment Tracking Stocks

May 17, 2016.

I. Introduction

On April 7, 2016, the New York Stock Exchange LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change to adopt initial and continued listing standards for the listing of Equity Investment Tracking Stocks and to adopt fees for Equity Investment Tracking Stocks. The proposed rule change was published for comment in the **Federal Register** on April 27, 2016.[3] On April 20, 2016, the Exchange filed Amendment No. 1 to the proposed rule change, which superseded the original filing in its entirety. On May 17, 2016, the Exchange filed Amendment No. 5 to the proposal, which superseded the filing, as amended by Amendment No. 1.[4] Amendment No. 5 is described in Item II below. The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 5, from interested persons.

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[4] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 77674 (April 21, 2016), 81 FR 24919 (April 27, 2016).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change, as Modified by Amendment No. 5

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item III below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to adopt initial and continued listing standards for the listing of Equity Investment Tracking Stocks. The Exchange also proposes to adopt listing fees specific to Equity Investment Tracking Stocks that are the sole listed common equity security of the issuer.

For purposes of proposed new Section 102.07 of the Manual, an Equity Investment Tracking Stock is defined as a class of common equity securities that tracks on an unleveraged basis the performance of an investment by the issuer in the common equity securities of a single other company listed on the Exchange. An Equity Investment Tracking Stock may track multiple classes of common equity securities of a single issuer, so long as all of those classes have identical economic rights and at least one of those classes is listed on the Exchange.

In order to qualify for initial listing under proposed Section 102.07, an Equity Investment Tracking Stock will be required to meet the distribution and public float requirements currently applicable for initial public offerings set forth in Sections 102.01A and 102.01B of the Manual, respectively, and the Global Market Capitalization set forth in Section 102.01C. As such, as required under Section 102.01A, an Equity Investment Tracking Stock, at the time of initial listing, will be required to have at least 400 holders of 100 shares or more and 1,100,000 public [sic] held shares available for trading. Further, as required under Section 102.01B, an Equity Investment Tracking Stock must have an aggregated [sic] market value of publicly-held shares of $40,000,000 and a per share price of $4 at the time of initial listing. Under Section 102.01C, the issuer of an Equity Investment Tracking Stock will be required to meet the Global Market Capitalization Test, under which the issuer must have $200 million in global market capitalization at the time of initial listing. The issuer of the Equity Investment Tracking Stock must also own (directly or indirectly[5]) at least 50% of both the economic interest and voting power of all of the outstanding classes of common equity of the issuer whose equity is tracked by the Equity Investment Tracking Stock. The Issuer of Equity Investment Tracking Stock must also fully comply with the Exchange's corporate governance requirements set forth in Section 303A of the Manual, subject to applicable exemptions such as those applicable to controlled companies.

The Exchange will not list an Equity Investment Tracking Stock if, at the time of the proposed listing, the issuer of the equity tracked by the Equity Investment Tracking Stock has been deemed below compliance with listing standards by the Exchange.

The Exchange proposes to subject the issuer of an Equity Investment Tracking Stock to the same continued listing standards under Sections 802.01A and 802.01B as are applicable to other companies listing common stocks on the Exchange. As such, these companies will be considered to be below compliance with Section 802.01A if (i) their number of total stockholders is less than 400 or (ii) their number of total stockholders is less than 1,200 and their average monthly trading volume is less than 100,000 shares (for the most recent 12 months) or (iii) their number of publicly-held shares is less than 600,000. Such companies will be deemed to be below compliance with Section 802.01B if their average global market capitalization over a consecutive 30 trading-day period is less than $50,000,000 and, at the same time stockholders' equity is less than $50,000,000 and (will be subject to immediate delisting if they are determined to have average global market capitalization over a consecutive 30 trading-day period of less than $15,000,000).

In the case of an Equity Investment Tracking Stock, the Exchange will review the continued listing status of that security if:

- The underlying listed equity security or securities whose value is tracked by the Equity Investment Tracking Stock ceases or cease to be listed on the Exchange.
- The issuer of the Equity Investment Tracking Stock owns (directly or indirectly) less than 50% of either the economic interest or the voting power of all of the outstanding classes of common equity of the issuer whose equity is tracked by the Equity Investment Tracking Stock.
- The Equity Investment Tracking Stock ceases to track the performance of the listed equity security or securities that was tracked at the time of initial listing.

In the event that any of the foregoing conditions exist [sic], the Exchange will determine whether the Equity Investment Tracking Stock meets any other applicable initial listing standard in place at that time. If the Equity Investment Tracking Stock does not qualify for initial listing at that time under another applicable listing standard the issuer will not be eligible to follow the procedures set forth in Sections 802.02 and 802.03 and the Exchange will immediately suspend the Equity Investment Tracking Stock and commence delisting proceedings. Furthermore, whenever trading in the equity security whose value is tracked by an Equity Investment Tracking Stock is suspended or delisting proceedings are commenced with respect to such security, such Equity Investment Tracking Stock will be suspended and/or delisting proceedings commenced with respect to such Equity Investment Tracking Stock at the same time.

The Exchange proposes to amend Section 202.06(B) of the Manual to provide that, in the event that the issuer of the common equity security tracked by an Equity Investment Tracking Stock intends to issue a material news release during the trading day and the staff of NYSE Regulation determines that a regulatory trading halt required by Section 202.06 should be implemented pending dissemination of the news or any other required regulatory trading halt should be implemented, the Exchange will also halt trading in the Equity Investment Tracking Stock simultaneously with the halt in the underlying security and will also recommence trading at the same time.

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[4] On May 13, 2016, the Exchange submitted and withdrew Amendment No. 2 to the proposed rule change. On May 13, 2016, the Exchange filed Amendment No. 3 to the proposed rule change, and on May 16, 2016 the Exchange withdrew Amendment No. 3 to the proposed rule change. On May 16, 2016 the Exchange submitted Amendment No. 4 to the proposal, and on May 17, 2016, the Exchange withdrew Amendment No. 4 to the proposed rule change.

[5] An example of an indirect ownership would be where the listed company has a 100%-owned subsidiary and that subsidiary in turn owns the stock of the company whose performance is being tracked. Another example would be where the listed company owns 100% of each of two subsidiaries, each of which owns stock in the company whose performance is being tracked.

The Exchange represents that it will monitor activity in Equity Investment Tracking Stocks to identify and deter any potential improper trading activity in such securities. The Exchange will adopt enhanced surveillance procedures to enable it to monitor Equity Investment Tracking Stocks alongside the securities whose value they track. Additionally, the Exchange represents that its surveillance procedures are generally adequate to properly monitor the trading of Equity Investment Tracking Stocks. Specifically, the Exchange will rely on its existing trading surveillances, administered by the Exchange, or the Financial Industry Regulatory Authority ("FINRA") on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.[6]

The surveillances referred to above generally focus on detecting securities trading outside their normal patterns, which could be indicative of manipulative or other violative activity. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

Given the novel investment characteristics of Equity Investment Tracking Stocks, the Exchange will conduct a review of the trading and compliance with continued listing standards of Equity Investment Tracking Stocks and their issuers over the initial two year period for which the proposed listing standard is in operation. The Exchange will furnish two reports to the SEC based on this review, one to be provided one year after the initial listing date of the first security listed under the proposed standard and the second to be provided on the second anniversary of such initial listing. At a minimum, the reports will address the relationship between the trading prices of listed Equity Investment Tracking Stocks and those of the securities whose values they track, the liquidity of the market for the two securities, and any manipulation concerns arising in connection with the trading of securities listed under the standard and the securities whose values are being tracked. The reports will also discuss any recommendations the Exchange may have for enhancements to the listing standard based on its review.

The proposed rule will provide that, prior to the commencement of trading of any Equity Investment Tracking Stock, the Exchange will distribute an Information Memorandum to its Members and Member Organizations that includes (a) any special characteristics and risks of trading the Equity Investment Tracking Stock, and (b) the Exchange Rules that will apply to the Equity Investment Tracking Stock including Exchange Rules that require Member Organizations:

- To use reasonable diligence in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer and concerning the authority of each person acting on behalf of such customer.
- In recommending transactions in the Equity Investment Tracking Stock to have a reasonable basis to believe that (1) the recommendation is suitable for a customer given reasonable inquiry concerning the customer's investment objectives, financial situation, needs, and any other information known by such Member Organization, and (2) the customer can evaluate the special characteristics, and is able to bear the financial risks, of an investment in the Equity Investment Tracking Stock.

The Exchange proposes to amend Sections 902.02 and 902.03 of the Manual to provide that, where an Equity Investment Tracking Stock is the only common equity security of the issuer listed on the Exchange, listing and annual fees for such security will be subject to a single fee cap at the time of original listing and on an annual basis. The Exchange further proposes to amend Section 907.00 of the Manual to limit the products and services provided to the issuer of an Equity Investment Tracking Stock for so long as it is the only common equity security of the issuer listed on the Exchange.

Pursuant to Sections 902.02 and 902.03 of the Manual, listed companies are charged an annual fee for each class or series of security listed on the Exchange. The annual fee is calculated based on the number of shares issued and outstanding and is currently set at a rate of $0.001025 for the primary listed class of equity, subject to an annual minimum of $52,500. In its first year of listing, a company's annual fee is prorated from the date of initial listing through the year end. Listed companies also pay other fees to the Exchange, including fees associated with initial and supplemental listing applications. In any given calendar year, however, Section 902.02 of the Manual specifies that the total fees that the Exchange may bill a listed company are capped at $500,000 (the "Total Maximum Fee"). For an Equity Investment Tracking Stock that is the issuer's only common equity security listed on the Exchange, the Exchange proposes to adopt a Total Maximum Fee of $200,000.

Section 902.03 of the Manual currently provides, in part, for listing fees the first time an issuer lists a class of common shares, charged on a per share basis based on tiers set forth in the rule. The first time that an issuer lists a class of common shares, the issuer is also subject to a one-time special charge of $50,000. Once listed, if an issuer lists additional shares of a class of previously listed securities, the issuer is subject to listing fees for such additional shares. The minimum and maximum listing fees applicable the first time an issuer lists a class of common shares are $125,000 and $250,000, respectively, which amounts include the special charge of $50,000. In lieu of the foregoing, the Exchange proposes to establish for an Equity Investment Tracking Stock that is its issuer's only common equity security listed on the Exchange a fixed initial listing fee (inclusive of the one-time charge) of $100,000. Subject to the Total Maximum Fee of $200,000 per year described above, the Exchange proposes to charge the same per share annual fee for Equity Investment Tracking Stocks as for the primary class of equity of a listed operating company (*i.e.*, currently $0.001025 per share, subject to the minimum annual fee of $52,500).

Finally, Section 907.00 of the Manual sets forth certain complimentary products and services that are offered to certain currently and newly listed issuers. These products and services are developed or delivered by NYSE or by a third party for use by NYSE-listed companies. Some of these products are commercially available from such third-party vendors. All listed issuers receive some complimentary products and services through the NYSE Market Access Center. The Exchange proposes to exclude issuers of an Equity Investment Tracking Stock that is the issuer's only common equity security listed on the Exchange from receiving the products and services provided for under Section 907.00, with the exception that such issuers will receive the complimentary products and services and access to discounted third-party products and services through the NYSE Market Access Center available to all listed issuers. Issuers of Equity Investment Tracking Stocks will be eligible for tier-based services commencing when they have an additional class of common equity securities listed. In determining eligibility for the various service tiers under Section 907.00, the Exchange will aggregate all of the outstanding shares of listed classes of common equity securities of a company, including all outstanding shares of any listed Equity Investment Tracking Stock that is not the issuer's only listed class of common equity securities.

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[6] FINRA conducts cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

The Exchange proposes to limit the fees that would be payable for the listing on an Equity Investment Tracking Stock as an incentive for the issuer to list such security on the Exchange. As described below, the Exchange proposes to make the aforementioned fee changes to better reflect the Exchange's costs related to listing Equity Investment Tracking Stocks and the corresponding value of such listing to issuers.

The Exchange proposes to make three other minor changes in this filing: (i) To remove from Section 902.03 references to the annual fee schedule applicable to years prior to 2016; (ii) to update the web link included in Section 907.00 and (iii) to delete the word "four" from Section 802.01B, as there are no longer four continued listing standards referred to in that rule.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[7] in general, and furthers the objectives of Sections 6(b)(4)[8] and 6(b)(5)[9] of the Act, in particular.

The Exchange believes that the proposed initial and continued listing standards for Equity Investment Tracking Stocks further the objectives of Section 6(b)(5) of the Act,[10] in particular in that they are designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest and is [sic] not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the proposed listing standards are designed to protect investors and the public interest by ensuring that Equity Investment Tracking Stocks listed on the Exchange meet stringent quantitative and qualitative listing standards to qualify for initial and continued listing. The Exchange notes that an Equity Investment Tracking Stock will be subject to delisting if they [sic] do [sic] not meet another applicable initial listing standard and (i) the underlying equity security whose value is tracked by the Equity Investment Tracking Stock ceases to be listed on the Exchange; (ii) the issuer of the Equity Investment Tracking Stock owns (directly or indirectly) less than 50% of either the economic interest or the voting power of all of the outstanding classes of common equity of the issuer whose equity is tracked by the Equity Investment Tracking Stock; or (iii) the Equity Investment Tracking Stock ceases to track the performance of the listed equity security that was tracked at the time of initial listing. The Issuer of Equity Investment Tracking Stock must also fully comply with the Exchange's corporate governance requirements set forth in Section 303A of the Manual, subject to applicable exemptions such as those applicable to controlled companies.

The Exchange notes that it is proposing to amend Section 202.06(B) to provide that, in the event that the issuer of the common equity security tracked by an Equity Investment Tracking Stock intends to issue a material news release during the trading day and the staff of NYSE Regulation determines that a regulatory trading halt pursuant to Section 202.06 should be implemented pending dissemination of the news or if the staff of NYSE Regulation determine [sic] that any other required regulatory trading halt should be implemented, the Exchange will also halt trading in the Equity Investment Tracking Stock simultaneously with the halt in the underlying security and will also recommence trading at the same time. The Exchange believes that this proposed amendment will protect investors and the public interest by preventing market participants from gaining an advantage in trading in an Equity Investment Tracking Stock based on their possession of material nonpublic information with respect to the company whose value is being tracked by the Equity Investment Tracking Stock.

The proposed rule requires the issuer of an Equity Investment Tracking Stock to meet the Global Market Capitalization Test in Section 102.01C of the Manual at the time of initial listing and does not allow applicants the alternative of meeting the Earnings Test, as would normally be available to an operating company applicant. The Exchange does not believe this is unfairly discriminatory, as many applicants will likely not have prepared standalone financial statements applicable to the equity investment being tracked and would therefore be unable to demonstrate compliance with the Earnings Test.

The proposed fee provisions further the objectives of Sections 6(b)(4) in that they are designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. The Exchange believes that the proposed fee provisions are consistent with Section 6(b)(5) of the Act in that they do not unfairly discriminate among listed companies because there is a reasonable justification for charging the issuer of an Equity Investment Tracking Stock different fees from those charged to other issuers as there are cost and regulatory efficiencies for the Exchange when the issuer of an Equity Investment Tracking Stock and the issuer of the underlying equity security are both listed on the Exchange. Under the Exchange's proposal, the issuer of an Equity Investment Tracking Stock that is the issuer's only common equity security listed on the Exchange would pay a fixed initial listing fee of $100,000, which is less than the minimum fee charged in connection with the listing of the primary class of equity of an operating company. In addition, Equity Investment Tracking Stocks would be billed annual fees at the same rate per share as the primary class of equity of an operating company, but, so long as the Equity Investment Tracking Stock is the issuer's only common equity security listed on the exchange, they [sic] will be subject to a lower annual fee cap that may cause an issuer of an Equity Investment Tracking Stock to be subject to a lower effective fee rate per share than if it were a regular operating company. Given the unique nature of an Equity Investment Tracking Stock, including especially the fact that its trading price will likely be primarily derivative of the trading price of the security of another company, most of the services provided by the

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[7] 15 U.S.C. 78f (b).

[8] 15 U.S.C. 78f(b)(4).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78f(b)(5).

Exchange under Section 907.00 would be of limited value and appeal to issuers of Equity Investment Tracking Stocks and the Exchange believes it is appropriate to exclude the issuers of Equity Investment Tracking Stocks from its services program. The Exchange believes that the fact that it will not provide these costly services makes it appropriate to charge lower fees. In addition, the Exchange believes there will be regulatory efficiencies when the same regulatory staff is responsible for oversight of an Equity Investment Tracking Stock and the underlying equity security. This would include, for example, the fact that news that is material to the issuer of the underlying security would also be material to an investment in the Equity Investment Tracking Stock.

The Exchange does not expect many issuers will seek to list an Equity Investment Tracking Stock. Accordingly, the Exchange does not anticipate that it will experience any meaningful diminution in revenue as a result of the proposed lower fees and therefore does not believe that the proposed fees would in any way negatively affect its ability to continue to adequately fund its regulatory program or the services the Exchange provides to issuers

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is designed to provide listing standards for Equity Investment Tracking Stocks that are appropriately protective of investors and is not designed to limit the ability of the issuers of those securities to list them on any other national securities exchange. The proposed rule change is designed to ensure that the fees charged by the Exchange accurately reflect the services provided and benefits realized by listed companies. The market for listing services is extremely competitive. Each listing exchange has a different fee schedule that applies to issuers seeking to list securities on its exchange. Issuers have the option to list their securities on these alternative venues based on the fees charged and the value provided by each listing. Because issuers have a choice to list their securities on a different national securities exchange, the Exchange does not believe that the proposed listing standards and fee changes impose a burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as modified by Amendment No. 5 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSE–2016–22 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2016–22. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2016–22, and should be submitted on or before June 13, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–12017 Filed 5–20–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–77847; File No. SR–NYSEArca–2016–64]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to the Listing and Trading of Shares of the AdvisorShares KIM Korea Equity ETF

May 17, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on May 2, 2016, NYSE Arca, Inc. (the "Exchange" or "NYSE Arca") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. On May 13, 2016, the Exchange submitted Amendment No. 1 to the proposed rule change, which replaces and supersedes the proposed rule change in its entirety. The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1 thereto, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade the shares of the following under NYSE Arca Equities Rule 8.600 ("Managed Fund Shares"): AdvisorShares KIM Korea Equity ETF. The proposed rule change is available on the Exchange's Web site at *www.nyse.com*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

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[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade shares ("Shares") of the following under NYSE Arca Equities Rule 8.600, which governs the listing and trading of Managed Fund Shares:[3] AdvisorShares KIM Korea Equity ETF ("Fund"). The Shares will be offered by AdvisorShares Trust (the "Trust"),[4] an open-end management investment company.[5] The investment adviser to the Fund will be AdvisorShares Investments LLC (the "Adviser"). Korea Investment Management Co., Ltd., will be the Fund's sub-adviser ("Sub-Adviser"). Foreside Fund Services, LLC (the "Distributor") will be the principal underwriter and distributor of the Fund's Shares. The Bank of New York Mellon (the "Administrator" or "Custodian") will serve as the administrator, custodian and transfer agent for the Fund.[6]

Commentary .06 to Rule 8.600 provides that, if the investment adviser to the investment company issuing Managed Fund Shares is affiliated with a broker-dealer, such investment adviser shall erect a "fire wall" between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to such investment company portfolio. In addition, Commentary .06 further requires that personnel who make decisions on the open-end fund's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the open-end fund's portfolio.[7] Commentary .06 to Rule 8.600 is similar to Commentary .03(a)(i) and (iii) to NYSE Arca Equities Rule 5.2(j)(3); however, Commentary .06 in connection with the establishment of a "fire wall" between the investment adviser and the broker-dealer reflects the applicable open-end fund's portfolio, not an underlying benchmark index, as is the case with index-based funds. Neither the Adviser nor the Sub-Adviser is registered as a broker-dealer. Neither the Adviser nor the Sub-Adviser is affiliated with a broker-dealer. In the event (a) the Adviser or the Sub-Adviser becomes a registered broker-dealer or becomes newly affiliated with a broker-dealer, or (b) any new adviser or any sub-adviser is a registered broker-dealer or becomes affiliated with a broker-dealer, it will implement a fire wall with respect to its relevant personnel or its broker-dealer affiliate regarding access to information concerning the composition and/or changes to the Fund's portfolio, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio.

Principal Investments

According to the Registration Statement, the Fund will seek to provide long-term capital appreciation above the capital appreciation of its primary benchmark, the MSCI Korea Index, and other Korea-focused indexes. The Fund will seek to achieve its investment objective by investing primarily in growth-oriented stocks of any capitalization range listed on the Korea Exchange. Under normal circumstances,[8] the Fund will invest at least 80% of its net assets (plus any borrowings for investment purposes) in equity securities listed on the Korea Exchange.[9] The Sub-Adviser will manage the Fund's portfolio by buying and holding stocks of companies at attractive valuation that it believes have growth potential. The Sub-Adviser will focus on corporate fundamental research in its stock selection, often called "bottom up" analysis. The Sub-Adviser will invest the Fund's assets with a mid- to long-term view, typically seeking to avoid short-term trading. In selecting investments for the Fund's portfolio, the Sub-Adviser will place emphasis on fundamentals rather than on short-term momentum and continuously monitor market risks. In deciding whether to sell investments in the Fund's portfolio, the Sub-Adviser will consider the following factors: A company's stock price reaches its target price; a company in the portfolio experiences negative fundamental changes; errors are found in the previous assumptions or forecasts of a company; and more profitable alternatives are found.

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[3] A Managed Fund Share is a security that represents an interest in an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1) ("1940 Act") organized as an open-end investment company or similar entity that invests in a portfolio of securities selected by its investment adviser consistent with its investment objectives and policies. In contrast, an open-end investment company that issues Investment Company Units, listed and traded on the Exchange under NYSE Arca Equities Rule 5.2(j)(3), seeks to provide investment results that correspond generally to the price and yield performance of a specific foreign or domestic stock index, fixed income securities index or combination thereof.

[4] The Trust is registered under the 1940 Act. On March 25, 2016, the Trust filed with the Commission amendments to its registration statement on Form N–1A under the Securities Act of 1933 (15 U.S.C. 77a) ("Securities Act") and under the 1940 Act relating to the Fund (File Nos. 333–157876 and 811–22110) ("Registration Statement"). The description of the operation of the Trust and the Fund herein is based, in part, on the Registration Statement. In addition, the Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. *See* Investment Company Act Release No. 29291 (May 28, 2010) (File No. 812–13677) ("Exemptive Order").

[5] The Commission has approved listing and trading on the Exchange of a number of actively managed funds under Rule 8.600. *See, e.g.*, Securities Exchange Act Release Nos. 63076 (October 12, 2010), 75 FR 63874 (October 18, 2010) (SR–NYSEArca–2010–79) (order approving Exchange listing and trading of Cambria Global Tactical ETF); 63802 (January 31, 2011), 76 FR 6503 (February 4, 2011) (SR–NYSEArca–2010–118) (order approving Exchange listing and trading of the SiM Dynamic Allocation Diversified Income ETF and SiM Dynamic Allocation Growth Income ETF); and 65468 (October 3, 2011), 76 FR 62873 (October 11, 2011) (SR–NYSEArca–2011–51) (order approving Exchange listing and trading of TrimTabs Float Shrink ETF); 75023 (May 21, 2015), 80 FR 30519 (May 28, 2015) (SR–NYSEArca–2014–100) (order approving proposed rule change relating to the listing and trading of shares of the SPDR SSgA Global Managed Volatility ETF under NYSE Arca Equities Rule 8.600); 77463 (March 29, 2016), 81 FR 19255 (April 4, 2016) (SR–NYSEArca–2015–107) (order approving proposed rule change to list and trade shares of the REX Gold Hedged S&P 500 ETF and the REX Gold Hedged FTSE Emerging Markets ETF under NYSE Arca Equities Rule 8.600).

[6] This Amendment No. 1 to SR–NYSEArca–2016–49 [sic] replaces SR–NYSEArca–2016–49 [sic] as originally filed and supersedes such filing in its entirety.

[7] An investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (the "Advisers Act"). As a result, the Adviser and Sub-Adviser and their related personnel are subject to the provisions of Rule 204A–1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A–1 under the Advisers Act. In addition, Rule 206(4)–7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

[8] The term "under normal circumstances" means, without limitation, the absence of extreme volatility or trading halts in the equity markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; or force majeure type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption or any similar intervening circumstance.

[9] The Korea Exchange is a member of the Intermarket Surveillance Group ("ISG").

In addition to individual stock selection, the Sub-Adviser will engage in sector allocation based on analysis of the macro economy and its effect on corporate competitiveness and industry cycles. This is often called "top down" analysis. The Sub-Adviser will strive to invest with large economic cycles as compared to short-term market trends and short-term supply and demand.

Other Investments

While the Fund, under normal circumstances, will invest at least 80% of its assets in the securities described above, the Fund may invest its remaining assets in the securities and financial instruments described below.

In addition to the common stocks of Korean companies referenced in the Principal Investments section above, the Fund may invest in the following equity securities traded on a U.S. or foreign exchange or over-the-counter ("OTC"), including equity securities of foreign issuers in emerging countries: Common stocks, preferred stocks, warrants, rights, securities convertible into common stock, and investments in master limited partnerships ("MLPs").

The Fund will invest in issuers located outside the United States directly and may invest in exchange-traded funds ("ETFs"),[10] exchange-traded notes ("ETNs")[11] and exchange-traded products ("ETPs")[12] that are indirectly linked to the performance of foreign issuers, and "Depositary Receipts", which are American Depositary Receipts ("ADRs"), Global Depositary Receipts ("GDRs"), European Depositary Receipts ("EDRs"), International Depositary Receipts ("IDRs"), "ordinary shares," and "New York shares" issued and traded in the U.S.[13]

The Fund may invest in the securities of non-exchange-traded investment company securities to the extent that such an investment would be consistent with the requirements of Section 12(d)(1) of the 1940 Act, or any rule, regulation or order of the Commission or interpretation thereof. Consistent with such restrictions discussed above, the Fund may invest in U.S. and non-U.S. exchange-listed closed-end funds and business development companies ("BDCs"). Except with respect to ETFs, as described above,[14] the Fund will not invest in inverse, leveraged, or inverse leveraged investment company securities.

The Fund may invest in U.S. government securities. Securities issued or guaranteed by the U.S. government or its agencies or instrumentalities include the following: U.S. Treasury securities, which are backed by the full faith and credit of the U.S. Treasury and which differ only in their interest rates, maturities, and times of issuance; U.S. Treasury bills, which have initial maturities of one year or less; U.S. Treasury notes, which have initial maturities of one to ten years; U.S. Treasury bonds, which generally have initial maturities of greater than ten years; and U.S. Treasury zero-coupon bonds. The Fund may invest in certain U.S. government securities that are issued or guaranteed by agencies or instrumentalities of the U.S. government including, but not limited to, obligations of U.S. government agencies or instrumentalities such as the Federal National Mortgage Association ("Fannie Mae"), the Federal Home Loan Mortgage Corporation ("Freddie Mac"), and the Government National Mortgage Association ("Ginnie Mae").

The Fund may invest in non-exchange-traded convertible securities that are bonds, debentures, notes, or other securities that may be converted or exchanged (by the holder or by the issuer) into shares of the underlying common stock (or cash or securities of equivalent value) at a stated exchange ratio.

The Fund may invest in shares of U.S. or non-U.S. exchange-traded real estate investment trusts ("REITs").

The Fund may invest in repurchase agreements and reverse repurchase agreements.

The Fund may purchase securities on a when-issued, delayed-delivery or forward commitment basis (*i.e.,* delivery and payment can take place between a month and 120 days after the date of the transaction).

To respond to adverse market, economic, political or other conditions, the Fund may invest up to 100% of its total assets in high-quality, short-term debt securities and money market instruments either directly or through ETFs. The Fund may be invested in this manner for extended periods, depending on the Sub-Advisor's assessment of market conditions. Debt securities and money market instruments are the following: Shares of other mutual funds, commercial paper, certificates of deposit, bankers' acceptances, U.S. government securities, repurchase agreements, and bonds that are rated BBB or higher.

Investment Restrictions

According to the Registration Statement, the Fund will be classified as a diversified investment company under the 1940 Act.[15]

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[10] For purposes of this proposed rule change, ETFs are Investment Company Units (as described in NYSE Arca Equities Rule 5.2(j)(3)); Portfolio Depositary Receipts (as described in NYSE Arca Equities Rule 8.100); and Managed Fund Shares (as described in NYSE Arca Equities Rule 8.600). The ETFs all will be listed and traded in the U.S. on registered exchanges. The Fund will invest in the securities of ETFs registered under the 1940 Act consistent with the requirements of Section 12(d)(1) of the 1940 Act, or any rule, regulation or order of the Commission or interpretation thereof. The Fund will only make such ETF investments in conformity with the requirements of Regulation M of the Internal Revenue Code of 1986, as amended. While the Fund may invest in inverse ETFs, the Fund will not invest in leveraged or inverse leveraged ETFs (*e.g.,* 2X or 3X).

[11] ETNs include Index-Linked Securities (as described in NYSE Arca Equities Rule 5.2(j)(6)). While the Fund may invest in inverse ETNs, the Fund will not invest in leveraged or inverse leveraged ETNs (*e.g.,* 2X or 3X).

[12] For purposes of this proposed rule change, ETPs include Trust Issued Receipts (as described in NYSE Arca Equities Rule 8.200) and Currency Trust Shares (as described in NYSE Arca Equities Rule 8.202). While the Fund may invest in inverse ETPs, the Fund will not invest in leveraged or inverse leveraged ETPs (*e.g.,* 2X or 3X).

[13] According to the Registration Statement, ADRs are U.S. dollar denominated receipts typically issued by U.S. banks and trust companies that evidence ownership of underlying securities issued by a foreign issuer. The underlying securities may not necessarily be denominated in the same currency as the securities into which they may be converted. The underlying securities are held in trust by a custodian bank or similar financial institution in the issuer's home country. The depositary bank may not have physical custody of the underlying securities at all times and may charge fees for various services, including forwarding dividends and interest and corporate actions. Generally, ADRs in registered form are designed for use in domestic securities markets and are traded on exchanges or over-the-counter in the U.S. GDRs, EDRs, and IDRs are similar to ADRs in that they are certificates evidencing ownership of shares of a foreign issuer, however, GDRs, EDRs, and IDRs may be issued in bearer form and denominated in other currencies, and are generally designed for use in specific or multiple securities markets outside the U.S. EDRs, for example, are designed for use in European securities markets while GDRs are designed for use throughout the world. Ordinary shares are shares of foreign issuers that are traded abroad and on a U.S. exchange. New York shares are shares that a foreign issuer has allocated for trading in the U.S. ADRs, ordinary shares, and New York shares all may be purchased with and sold for U.S. dollars. Not more than 10% of the Fund's assets will be invested in non-exchange-traded ADRs. Other ADRs in which the Fund invests will be exchange-traded.

[14] *See* note 11, *supra.*

The Fund intends to qualify as a "regulated investment company" for purposes of the Internal Revenue Code of 1986.[16]

The Fund may hold up to an aggregate amount of 15% of its net assets in assets deemed illiquid by the Adviser.[17] The Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of the Fund's net assets are held in illiquid assets. Illiquid assets include securities subject to contractual or other restrictions on resale and other instruments that lack readily available markets as determined in accordance with Commission staff guidance.[18]

The Fund may not:

(a) With respect to 75% of its total assets, (i) purchase securities of any issuer (except securities issued or guaranteed by the U.S. government, its agencies or instrumentalities or shares of investment companies) if, as a result, more than 5% of its total assets would be invested in the securities of such issuer, or (ii) acquire more than 10% of the outstanding voting securities of any one issuer.

(b) Invest 25% or more of its total assets in the securities of one or more issuers conducting their principal business activities in the same industry or group of industries. This limitation does not apply to investments in securities issued or guaranteed by the U.S. government, its agencies or instrumentalities, or shares of investment companies. The Fund will not invest 25% or more of its total assets in any investment company that so concentrates.

The Fund will not invest in options, futures, swaps or forward contracts.

The Fund's investments will be consistent with its investment objective and will not be used to provide multiple returns of a benchmark or to produce leveraged returns. The Fund's investments will not be used to seek performance that is the multiple or inverse multiple (*e.g.*, 2Xs and 3Xs) of the Fund's primary broad-based securities benchmark index (as defined in Form N–1A).[19]

Creation and Redemption of Shares

According to the Registration Statement, the Trust will issue and sell Shares of the Fund only in "Creation Units" of at least 25,000 Shares on a continuous basis through the Distributor, at their net asset value ("NAV") next determined after receipt, on any business day, of an order received in proper form.

Creation Units of the Fund will be sold only for cash ("Cash Purchase Amount"). Creation Units will be sold at the NAV next computed, plus a transaction fee. The Trust reserves the right to offer an in-kind option for creations of Creation Units for the Fund.

To be eligible to place orders with the Distributor to create a Creation Unit of the Fund, an entity must be (i) a "Participating Party," *i.e.*, a broker-dealer or other participant in the clearing process through the Continuous Net Settlement System of the National Securities Clearing Corporation ("NSCC"), a clearing agency that is registered with the Commission; or (ii) a Depository Trust Company ("DTC ") Participant, and, in each case, must have executed an agreement with the Trust, the Distributor and the Administrator with respect to creations and redemptions of Creation Units ("Participant Agreement"). A Participating Party and DTC Participant are collectively referred to as an "Authorized Participant."

All orders to create Creation Units must be received by the Distributor no later than the close of the regular trading session on the Exchange (ordinarily 4:00 p.m., Eastern Time), in each case on the date such order is placed in order for the creation of Creation Units to be effected based on the NAV of Shares of the Fund as next determined on such date after receipt of the order in proper form.

All purchases of the Fund will be effected through a transfer of cash directly through DTC.

Shares may be redeemed only in Creation Units at their NAV next determined after receipt of a redemption request in proper form by the Fund through the Administrator and only on a business day.

The redemption proceeds for a Creation Unit of the Fund will consist solely of cash in an amount equal to the NAV of the Shares being redeemed, as next determined after receipt of a request in proper form, less a redemption transaction fee (the "Cash Redemption Amount"). The Trust reserves the right to offer an in-kind option for redemptions of Creation Units for the Fund.[20]

The right of redemption may be suspended or the date of payment postponed with respect to the Fund (1) for any period during which the NYSE is closed (other than customary weekend and holiday closings); (2) for any period during which trading on the NYSE is suspended or restricted; (3) for any period during which an emergency exists as a result of which disposal of the Shares of the Fund or determination of the Shares' NAV is not reasonably practicable; or (4) in such other circumstance as is permitted by the Commission.

Net Asset Value

According to the Registration Statement, the Fund will calculate NAV by (i) taking the current market value of its total assets, (ii) subtracting any liabilities, and (iii) dividing that amount by the total number of Shares owned by shareholders.

The Fund will calculate NAV once each business day as of the regularly scheduled close of normal trading on the New York Stock Exchange (the "NYSE") (normally 4:00 p.m. Eastern Time).

In calculating NAV, the Fund generally will value its portfolio investments at market prices. Given that the Fund's investments generally trade on a foreign exchange, they will be valued based on their closing prices on that exchange, subject to possible adjustment. Investments in stocks traded on the Korea Exchange will be valued based on the applicable closing price on the Korea Exchange.

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[15] The diversification standard is set forth in Section 5(b)(1) of the 1940 Act.

[16] 26 U.S.C. 851.

[17] Under the supervision of the Fund's Board of Trustees ("Board"), the Adviser determines the liquidity of the Fund's investments. In determining the liquidity of the Fund's investments, the Adviser may consider various factors, including (1) the frequency and volume of trades and quotations; (2) the number of dealers and prospective purchasers in the marketplace; (3) dealer undertakings to make a market; and (4) the nature of the security and the market in which it trades (including any demand, put or tender features, the mechanics and other requirements for transfer, any letters of credit or other credit enhancement features, any ratings, the number of holders, the method of soliciting offers, the time required to dispose of the security, and the ability to assign or offset the rights and obligations of the security).

[18] The Commission has stated that long-standing Commission guidelines have required open-end funds to hold no more than 15% of their net assets in illiquid securities and other illiquid assets. *See* Investment Company Act Release No. 28193 (March 11, 2008), 73 FR 14618 (March 18, 2008), footnote 34. *See also*, Investment Company Act Release No. 5847 (October 21, 1969), 35 FR 19989 (December 31, 1970) (Statement Regarding "Restricted Securities"); Investment Company Act Release No. 18612 (March 12, 1992), 57 FR 9828 (March 20, 1992) (Revisions of Guidelines to Form N–1A). A fund's portfolio security is illiquid if it cannot be disposed of in the ordinary course of business within seven days at approximately the value ascribed to it by the fund. *See* Investment Company Act Release No. 14983 (March 12, 1986), 51 FR 9773 (March 21, 1986) (adopting amendments to Rule 2a–7 under the 1940 Act); Investment Company Act Release No. 17452 (April 23, 1990), 55 FR 17933 (April 30, 1990) (adopting Rule 144A under the 1933 Act).

[19] The Fund's broad-based securities benchmark index will be identified in a future amendment to the Registration Statement following the Fund's first full calendar year of performance.

[20] Creations or redemptions conducted in cash will be effected in the same manner for all Authorized Participants.

The NAV per Share of the Fund will be computed by dividing the value of the net assets of the Fund (*i.e.,* the value of its total assets less total liabilities) by the total number of Shares of the Fund outstanding, rounded to the nearest cent. Expenses and fees, including without limitation, the management, administration and distribution fees, will be accrued daily and taken into account for purposes of determining NAV per Share. The NAV per Share for the Fund will be calculated by the Administrator and determined as of the regularly scheduled close of normal trading on the NYSE (normally 4:00 p.m. Eastern Time) on each day that the NYSE is open.

In computing the Fund's NAV, the Fund's securities holdings will be valued based on their last readily available market price. Price information on listed securities, including ETFs, ETNs and ETPs in which the Fund invests, will be taken from the exchange where the security is primarily traded. Other portfolio securities and assets for which market quotations are not readily available or determined to not represent the current fair value will be valued based on fair value as determined in good faith by the Fund's Sub-Adviser in accordance with procedures adopted by the Fund's Board of Trustees ("Board").

Exchange-traded equity securities, including common stocks, ETFs, ETNs, ETPs, preferred stocks, rights, warrants, convertible securities, closed-end funds, certain Depositary Receipts, MLPs, REITs, and BDCs will be valued at market value, which will generally be determined using the last reported official closing or last trading price on the exchange or market on which the security is primarily traded at the time of valuation or, if no sale has occurred, at the last quoted bid price on the primary market or exchange on which they are traded. If market prices are unavailable or the Fund believes that they are unreliable, or when the value of a security has been materially affected by events occurring after the relevant market closes, the Fund will price those securities at fair value as determined in good faith using methods approved by the Fund's Board.

OTC-traded common stocks, OTC ADRs, preferred stocks, rights, warrants, convertible securities, and MLPs will be valued at the last reported sale price from the OTC Bulletin Board or OTC Link LLC on the valuation date. If such OTC-traded security does not trade on a particular day, then the mean between the last quoted closing bid and asked price will be used.

Non-exchange-traded convertible securities, U.S. government securities, short-term debt securities, repurchase agreements and reverse repurchase agreements will be valued at prices supplied by approved pricing services.

Investment company securities (other than exchange-traded investment company securities) will be valued at NAV.

Availability of Information

The Fund's Web site (*www.advisorshares.com*), which will be publicly available prior to the public offering of Shares, will include a form of the prospectus for the Fund that may be downloaded. The Fund's Web site will include additional quantitative information updated on a daily basis, including, for the Fund, (1) daily trading volume, the prior business day's reported closing price, NAV and mid-point of the bid/ask spread at the time of calculation of such NAV (the "Bid/Ask Price"),[21] and a calculation of the premium and discount of the Bid/Ask Price against the NAV, and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. On each business day, before commencement of trading in Shares in the Core Trading Session on the Exchange, the Fund will disclose on its Web site the Disclosed Portfolio that will form the basis for the Fund's calculation of NAV at the end of the business day.[22]

On a daily basis, the Adviser, on behalf of the Fund, will disclose on the Fund's Web site the following information regarding each portfolio holding, as applicable to the type of holding: Ticker symbol, CUSIP number or other identifier, if any; a description of the holding (including the type of holding); the identity of the security, index, or other asset or instrument underlying the holding, if any; quantity held (as measured by, for example, par value, notional value or number of shares, contracts or units); maturity date, if any; coupon rate, if any; effective date, if any; market value of the holding; and the percentage weighting of the holding in the Fund's portfolio. The Web site information will be publicly available at no charge.

In addition, a basket composition file, which includes the security names and share quantities (as applicable) required to be delivered in exchange for Fund Shares, together with estimates and actual cash components, will be publicly disseminated daily prior to the opening of the NYSE via the NSCC. The basket will represent one Creation Unit of the Fund.

Investors can also obtain the Fund's Statement of Additional Information ("SAI"), the Fund's Shareholder Reports, and its Form N–CSR and Form N–SAR, filed twice a year. The Trust's SAI and Shareholder Reports will be available free upon request from the Trust, and those documents and the Form N–CSR and Form N–SAR may be viewed on-screen or downloaded from the Commission's Web site at *www.sec.gov.* Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers. Price information for stocks listed on the Korea Exchange is available from the Korea Exchange Web site and from major market data vendors. Quotation and last sale information for the Shares and U.S. exchange-listed equity securities, including common stocks, ETFs, ETNs, ETPs, preferred stocks, rights, warrants, convertible securities, closed-end funds, MLPs, REITs, and BDCs and certain Depositary Receipts will be available via the Consolidated Tape Association ("CTA") high-speed line, and will be available from the national securities exchange on which they are listed. Prices related to foreign exchange-traded common stocks, preferred stocks, rights, warrants, convertible securities, MLPs, REITs and BDCs will be available from the applicable exchange or from major market data vendors. Intra-day and closing price information relating to OTC-traded common stocks, OTC ADRs, preferred stocks, rights, warrants, convertible securities and MLPs will be available from major market data vendors. Price information regarding investment company securities (other than exchange-traded investment company securities) will be available from the applicable fund. Price information regarding U.S. government securities, short-term debt securities, non-exchange-traded convertible securities, money market funds, repurchase agreements, and reverse repurchase agreements may be obtained from brokers and dealers who make markets in such securities or through nationally recognized pricing services through subscription agreements.

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[21] The Bid/Ask Price of Shares of the Fund will be determined using the mid-point of the highest bid and the lowest offer on the Exchange as of the time of calculation of the Fund's NAV. The records relating to Bid/Ask Prices will be retained by the Fund and its service providers.

[22] Under accounting procedures followed by the Fund, trades made on the prior business day ("T") will be booked and reflected in NAV on the current business day ("T+1"). Accordingly, the Fund will be able to disclose at the beginning of the business day the portfolio that will form the basis for the NAV calculation at the end of the business day.

In addition, the Portfolio Indicative Value, as defined in NYSE Arca Equities Rule 8.600 (c)(3), based on current information regarding the value of the securities and other assets in the Disclosed Portfolio, will be widely disseminated at least every 15 seconds during the Core Trading Session by one or more major market data vendors.[23] The dissemination of the Portfolio Indicative Value, together with the Disclosed Portfolio, will allow investors to determine the value of the underlying portfolio of the Fund on a daily basis and will provide a close estimate of that value throughout the trading day. The Portfolio Indicative Value should not be viewed as a "real-time" update of the NAV per Share of the Fund, which will be calculated once per day.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund.[24] Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) The extent to which trading is not occurring in the securities and/or the financial instruments comprising the Disclosed Portfolio of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares will be subject to NYSE Arca Equities Rule 8.600(d)(2)(D), which sets forth circumstances under which Shares of the Fund may be halted.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Shares will trade on the NYSE Arca Marketplace from 4 a.m. to 8 p.m. Eastern Time in accordance with NYSE Arca Equities Rule 7.34 (Opening, Core, and Late Trading Sessions). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in NYSE Arca Equities Rule 7.6, the minimum price variation ("MPV") for quoting and entry of orders in equity securities traded on the NYSE Arca Marketplace is $0.01, with the exception of securities that are priced less than $1.00 for which the MPV for order entry is $0.0001.

The Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rule 8.600. Consistent with NYSE Arca Equities Rule 8.600(d)(2)(B)(ii), the Adviser, as the Reporting Authority, will implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the actual components of the Fund's portfolio. The Exchange represents that, for initial and/or continued listing, the Fund will be in compliance with Rule 10A–3[25] under the Act, as provided by NYSE Arca Equities Rule 5.3. A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange. The Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio as defined in NYSE Arca Equities Rule 8.600(c)(2) will be made available to all market participants at the same time.

Surveillance

The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by the Exchange or the Financial Industry Regulatory Authority ("FINRA") on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.[26] The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.

The surveillances referred to above generally focus on detecting securities trading outside their normal patterns, which could be indicative of manipulative or other violative activity. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange or FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares and certain underlying exchange-traded equity securities (including common stocks, ETFs, ETNs, ETPs, preferred stock, rights, warrants, exchange-traded convertible securities, closed-end funds, MLPs, REITs, BDCs and certain Depositary Receipts) with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, may obtain trading information regarding trading in the Shares and such securities and financial instruments from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and such securities and financial instruments from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.[27] The Exchange is able to access from FINRA, as needed, trade information for certain fixed income securities held by the Fund reported to FINRA's Trade Reporting and Compliance Engine ("TRACE").

Not more than 10% of the net assets of the Fund in the aggregate invested in equity securities (other than non-exchange-traded investment company securities) shall consist of equity securities whose principal market is not a member of the ISG or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement.

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

All statements and representations made in this filing regarding (a) the description of the portfolio, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange rules and surveillance procedures shall constitute continued listing requirements for listing the Shares on the Exchange.

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[23] Currently, it is the Exchange's understanding that several major market data vendors display and/or make widely available Portfolio Indicative Values taken from CTA or other data feeds.

[24] *See* NYSE Arca Equities Rule 7.12.

[25] 17 CFR 240.10A–3.

[26] FINRA conducts cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

[27] For a list of the current members of ISG, *see www.isgportal.org.* The Exchange notes that not all components of the Disclosed Portfolio for the Fund may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Equities Rule 5.5(m).

Information Bulletin

Prior to the commencement of trading, the Exchange will inform its Equity Trading Permit Holders in an Information Bulletin ("Bulletin") of the special characteristics and risks associated with trading the Shares. Specifically, the Bulletin will discuss the following: (1) The procedures for purchases and redemptions of Shares in Creation Unit aggregations (and that Shares are not individually redeemable); (2) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its Equity Trading Permit Holders to learn the essential facts relating to every customer prior to trading the Shares; (3) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated Portfolio Indicative Value will not be calculated or publicly disseminated; (4) how information regarding the Portfolio Indicative Value and the Disclosed Portfolio is disseminated; (5) the requirement that Equity Trading Permit Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information.

In addition, the Bulletin will reference that the Fund is subject to various fees and expenses described in the Registration Statement. The Bulletin will discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Act. The Bulletin will also disclose that the NAV for the Shares will be calculated after 4:00 p.m. Eastern Time each trading day.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)[28] that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NYSE Arca Equities Rule 8.600. The Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws. The Exchange or FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares, certain underlying exchange-traded equity securities (including common stocks, ETFs, ETNs, ETPs, preferred stock, rights, warrants, exchange-traded convertible securities, closed-end funds, REITs, MLPs, BDCs and certain Depositary Receipts) with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, may obtain trading information regarding trading in the Shares and such securities and financial instruments from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and such securities and financial instruments from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. Not more than 10% of the net assets of the Fund in the aggregate invested in equity securities (other than non-exchange-traded investment company securities) shall consist of equity securities whose principal market is not a member of the ISG or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement. Neither the Adviser nor the Sub-Adviser is registered as a broker-dealer. The Fund's investments will be consistent with its investment objective and will not be used to provide multiple returns of a benchmark or to produce leveraged returns. The Fund's investments will not be used to seek performance that is the multiple or inverse multiple (*i.e.*, 2Xs and 3Xs) of the Fund's primary broad-based securities benchmark index (as defined in Form N–1A).

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that the Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time. In addition, a large amount of information will be publicly available regarding the Fund and the Shares, thereby promoting market transparency. Quotation and last sale information for the Shares will be available via the CTA high-speed line. In addition, the Portfolio Indicative Value will be widely disseminated at least every 15 seconds during the Core Trading Session by one or more major market data vendors. The Fund's Web site will include a form of the prospectus for the Fund that may be downloaded, as well as additional quantitative information updated on a daily basis. On each business day, before commencement of trading in Shares in the Core Trading Session on the Exchange, the Fund will disclose on its Web site the Disclosed Portfolio that will form the basis for the Fund's calculation of NAV at the end of the business day. On a daily basis, the Adviser, on behalf of the Fund, will disclose on the Fund's Web site the following information regarding each portfolio holding, as applicable to the type of holding: Ticker symbol, CUSIP number or other identifier, if any; a description of the holding (including the type of holding); the identity of the security, index, or other asset or instrument underlying the holding, if any; quantity held (as measured by, for example, par value, notional value or number of shares, contracts or units); maturity date, if any; coupon rate, if any; effective date, if any; market value of the holding; and the percentage weighting of the holding in the Fund's portfolio. The Web site information will be publicly available at no charge.

Moreover, prior to the commencement of trading, the Exchange will inform its Equity Trading Permit Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. Trading in the Shares will be subject to NYSE Arca Equities Rule 8.600(d)(2)(D), which sets forth circumstances under which Shares of the Fund may be halted. In addition, as noted above, investors will have ready access to information regarding the Fund's holdings, the Portfolio Indicative

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[28] 15 U.S.C. 78f(b)(5).

Value, the Disclosed Portfolio, and quotation and last sale information for the Shares.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of an additional type of actively-managed exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, the Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws. In addition, as noted above, investors will have ready access to information regarding the Fund's holdings, the Portfolio Indicative Value, the Disclosed Portfolio, and quotation and last sale information for the Shares.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act. The Exchange notes that the proposed rule change will facilitate the listing and trading of an additional type of actively-managed exchange-traded product that primarily holds equity securities and that will enhance competition among market participants, to the benefit of investors and the marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2016–64 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2016–64. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2016–64 and should be submitted on or before June 13, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[29]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–12014 Filed 5–20–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–77849; File No. SR–NYSEArca–2016–62]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change Relating to a Change to the Underlying Index for the PowerShares Build America Bond Portfolio

May 17, 2016.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the "Act")[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on May 3, 2016, NYSE Arca, Inc. (the "Exchange" or "NYSE Arca") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to: (1) Permit the continued listing and trading of shares of the PowerShares Build America Bond Portfolio (the "Fund") following a change to the index underlying the Fund, and (2) propose changes to the index underlying the Fund and the name of the Fund, as described below. The proposed rule change is available on the Exchange's Web site at *www.nyse.com*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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[29] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange currently lists and trades shares ("Shares") of the Fund[4] under NYSE Arca Equities Rule 5.2(j)(3), Commentary .02, which governs the listing and trading of Investment Company Units ("Units") based on fixed income securities indexes.[5] The Fund is a series of the PowerShares Exchange-Traded Fund Trust II ("Trust").[6]

Invesco PowerShares Capital Management LLC is the investment adviser ("Adviser") for the Fund. Invesco Distributors, Inc. is the Fund's distributor ("Distributor"). The Bank of New York Mellon is the administrator, custodian and fund accounting and transfer agent for the Fund.

The Exchange is submitting this proposed rule change (1) to permit the continued listing and trading of Shares of the Fund following a change to the index underlying the Fund, and (2) to propose changes to the index underlying the Fund and the name of the Fund, as described below.

The Fund seeks investment results that generally correspond to the price and yield (before fees and expenses) of The BofA Merrill Lynch Build America Bond Index (the "Build America Bond Index"). The Fund generally invests at least 80% of its total assets in taxable municipal securities eligible to participate in the Build America Bond program created under the American Recovery and Reinvestment Act of 2009 or other legislation providing for the issuance of taxable municipal securities on which the issuer receives federal support of the interest paid ("Build America Bonds") and that comprise the Build America Bond Index. The Build America Bond Index is designed to track the performance of U.S. dollar-denominated investment grade taxable municipal debt publicly issued under the Build America Bond program by U.S. states and territories, and their political subdivisions, in the U.S. market. Qualifying securities must have a minimum amount outstanding of $1 million, at least 18 months remaining term to final maturity at the time of issuance and at least one year remaining term to final maturity, a fixed coupon schedule and an investment grade rating (based on an average of Moody's Investors Services, Inc. ("Moody's"), Standard & Poor's, a division of The McGraw-Hill Company, Inc. ("S&P") and Fitch Ratings, Inc. ("Fitch").

As described below, the Trust has proposed to change the index underlying the Fund to the BofA Merrill Lynch US Taxable Municipal Securities Plus Index (the "New Index") and to change the name of the Fund to PowerShares Taxable Municipal Bond Portfolio. The New Index does not meet the generic listing criteria of NYSE Arca Equities Rule 5.2(j)(3), as described below. The Exchange is submitting this proposed rule change to permit the continued listing of the Fund. The New Index meets all of the requirements of the generic listing criteria of NYSE Arca Equities Rule 5.2(j)(3), except for those set forth in Commentary .02(a)(2).[7] Specifically, as of February 4, 2016, approximately 60.51% of the New Index weight was composed of individual maturities of $100 million or more (determined at the time of issuance).

Changes to Index Underlying the Fund

As stated in the Registration Statement, the Fund currently has a non-fundamental policy to invest at least 80% of its net assets (plus the amount of any borrowings for investment purposes) in Build America Bonds. Moreover, as stated in the Registration Statement, the Fund complies with that non-fundamental policy because it also is required generally to invest at least 80% of the value of its total assets in the Build America Bonds that comprise the Build America Bond Index, in accordance with the terms of the relief set forth in the Trust's Exemptive Order.

However, in response to a changing market environment that includes a reduction in the number of Build America Bonds, the Adviser has proposed that the Fund's underlying index be changed from one that is focused on Build America Bonds to one that is more broadly focused on taxable municipal debt in general, and which may include Build America Bonds. Changing the Fund's underlying index would require changing the non-fundamental policy set forth above; accordingly, before the Fund can change its underlying index, the Registration Statement states that the Fund's board of trustees (the "Board") must approve the underlying index change, and the Fund must provide shareholders with sixty days written notice of the change.

Thus, after this proposed rule change is approved, the Trust represents that it intends to seek to obtain Board approval and provide the requisite shareholder notice. Subject to that Board approval and shareholder notice, the Fund intends to change its underlying index to one that is composed of taxable municipal securities, including both Build America Bonds and non-Build America Bonds. Following such change, the proposed underlying index for the Fund will be the New Index.

According to the Trust, the change in Fund's underlying index is designed to enable the Fund to expand its range of investments in light of a diminishing supply of Build America Bonds; otherwise, there is no other change to the Fund's investment strategies or objective. After such change, the Fund's investment objective will be to seek investment results that generally correspond (before fees and expenses) to the price and yield of the New Index.

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[4] On February 26, 2016, the Trust filed a post-effective amendment on Form 485 under the Securities Act of 1933 (15 U.S.C. 77a) ("1933 Act") to its registration statement on Form N–1A under the 1933 Act and the Investment Company Act of 1940 ("1940 Act") (15 U.S.C. 80a–1) (File Nos. 333–138490 and 811–21977) (the "Registration Statement"). The description of the operation of the Trust and the Fund herein is based, in part, on the Registration Statement. In addition, the Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. *See* Investment Company Act Release No. 27841 (May 25, 2007) (File No. 812–13335) ("Exemptive Order").

[5] The PowerShares Build America Bond Portfolio was initially listed on the Exchange on November 17, 2009 pursuant to the generic listing criteria of Commentary .02 to NYSE Arca Equities Rule 5.2(j)(3).

[6] The Commission previously has approved a proposed rule change relating to listing and trading on the Exchange of Units based on municipal bond indexes. *See* Securities Exchange Act Release Nos. 75376 (July 7, 2015), 80 FR 40113 (July 13, 2015) (SR–NYSEArca–2015–18) (order approving listing and trading of Vanguard Tax-Exempt Bond Index Fund under NYSE Arca Equities Rule 5.2(j)(3), Commentary .02); 71232 (January 3, 2014), 79 FR 1662 (January 9, 2014) (SR–NYSEArca–2013–118) (order approving listing and trading of Market Vectors Short High-Yield Municipal Index ETF under NYSE Arca Equities Rule 5.2(j)(3), Commentary .02); 63881 (February 9, 2011), 76 FR 9065 (February 16, 2011) (SR–NYSEArca–2010–120) (order approving listing and trading of SPDR Nuveen S&P High Yield Municipal Bond ETF Fund under NYSE Arca Equities Rule 5.2(j)(3), Commentary .02); 67985 (October 4, 2012), 77 FR 61804 (October 11, 2012) (SR–NYSEArca–2012–92) (order approving proposed rule change relating to the listing and trading of iShares 2018 S&P AMT-Free Municipal Series and iShares 2019 S&P AMT-Free Municipal Series under NYSE Arca Equities Rule 5.2(j)(3), Commentary .02)); 75468 (July 16, 2015), 80 FR 43500 (July 22, 2015) (SR–NYSEArca–2015–25) (order approving proposed rule change relating to the listing and trading of iShares iBonds Dec 2021 AMT Free Municipal Bond ETF and iShares iBonds Dec 2022 AMT-Free Municipal Bond ETF under NYSE Arca Equities Rule 5.2(j)(3), Commentary .02); 72464 (June 25, 2014), 79 FR 37373 (July 1, 2014) (SR–NYSEArca–2014–45) (order approving proposed rule change governing the continued listing and trading of Shares of the PowerShares Insured California Municipal Bond Portfolio, PowerShares Insured National Municipal Bond Portfolio and PowerShares Insured New York Municipal Bond Portfolio under NYSE Arca Equities Rule 5.2(j)(3), Commentary .02).

[7] Commentary .02(a)(2) to NYSE Arca Equities Rule 5.2(j)(3) provides that components that in the aggregate account for at least 75% of the weight of the index or portfolio each shall have a minimum original principal amount outstanding of $100 million or more.

In addition, the Fund will adopt a new non-fundamental investment policy to invest at least 80% of its net assets (plus borrowings for investment purposes) in taxable municipal securities. In addition, the Fund generally will invest at least 80% of its total assets in the securities that will compose the New Index, in accordance with the terms of the Trust's Exemptive Order. However, the Fund may invest up to 20% of its total assets in securities not included in the New Index, in money market instruments, including repurchase agreements or other funds that invest exclusively in money market instruments (subject to applicable limitations under the 1940 Act or exemptions therefrom), convertible securities and structured notes (notes on which the amount of principal repayment and interest payments is based on the movement of one or more specified factors, such as the movement of a particular security or securities index), all to the extent that the Adviser believes investment in such instruments will facilitate the Fund's ability to achieve its new investment objective. In addition, the Fund intends to change its name to PowerShares Taxable Municipal Bond Portfolio.[8]

Description of the New Index[9]

The New Index tracks the performance of U.S. dollar denominated taxable municipal debt publicly issued by U.S. states and territories, and their political subdivisions, in the U.S. domestic market. Qualifying securities must be subject to U.S. federal taxes and must have at least 18 months to maturity at point of issuance, at least one year remaining term to final maturity, a fixed coupon schedule (including zero coupon bonds) and an investment grade rating (based on an average of Moody's, S&P and Fitch). The call date on which a pre-refunded bond will be redeemed is used for purposes of determining qualification with respect to final maturity requirements. For Build America Bonds the minimum amount outstanding is $1 million, and only "direct pay" (*i.e.,* a direct federal subsidy is paid to the issuer) securities qualify for inclusion. "Tax-Credit" (*i.e.,* where the investor receives a tax credit on the interest payments) Build America Bonds are excluded. For all other securities, minimum size requirements vary based on the initial term to final maturity at time of issuance. Securities with an initial term to final maturity greater than or equal to one year and less than five years must have a current amount outstanding of at least $10 million. Securities with an initial term to final maturity greater than or equal to five years and less than ten years must have a current amount outstanding of at least $15 million. Securities with an initial term to final maturity of ten years or more must have a current amount outstanding of at least $25 million. Local bonds issued by U.S. territories within their jurisdictions that are tax exempt within the U.S. territory but not elsewhere are excluded from the New Index. All Rule 144A securities, both with and without registration rights, and securities in legal default are excluded from the New Index. New Index constituents are capitalization-weighted based on their current amount outstanding times the market price plus accrued interest. Accrued interest is calculated assuming next-day settlement. Cash flows from bond payments that are received during the month are retained in the index until the end of the month and then are removed as part of the rebalancing. Cash does not earn any reinvestment income while it is held in the New Index.[10] The index is rebalanced on the last calendar day of the month, based on information available up to and including the third business day before the last business day of the month. No changes are made to constituent holdings other than on month end rebalancing dates.

As of February 4, 2016, approximately 84.39% of the weight of the New Index components was composed of individual maturities that were part of an entire municipal bond offering with a minimum original principal amount outstanding of $100 million or more for all maturities of the offering. In addition, as of February 4, 2016, the total dollar amount outstanding of issues in the New Index was approximately $281,589,346,769 and the average dollar amount outstanding of issues in the New Index was approximately $27,808,547. Further, the most heavily weighted component represents 2.27% of the weight of the Index and the five most heavily weighted components represent 6.33% of the weight of the New Index.[11] Therefore, the Exchange believes that, notwithstanding that the New Index does not satisfy the criterion in NYSE Arca Equities Rule 5.2(j)(3), Commentary .02(a)(2), the New Index is sufficiently broad-based to deter potential manipulation, given that it is composed of approximately 10,126 issues and 1,811 unique issuers. In addition, the New Index securities are sufficiently liquid to deter manipulation in that a substantial portion (84.39%) of the New Index weight is composed of maturities that are part of a minimum original principal amount outstanding of $100 million or more for all the maturities of the offering, and in view of the substantial total dollar amount outstanding and the average dollar amount outstanding of New Index issues, as referenced above.

All components of the New Index have at least an investment grade composite rating of BBB3 or higher (based on an average of S&P, Moody's and Fitch).

The Exchange represents that: (1) With respect to the New Index, except for Commentary .02(a)(2) to NYSE Arca Equities Rule 5.2(j)(3), the Shares of the New Index currently satisfy all of the generic listing standards under NYSE Arca Equities Rule 5.2(j)(3); (2) the continued listing standards under NYSE Arca Equities Rules 5.2(j)(3) and 5.5(g)(2) applicable to Units shall apply to the Shares of the Fund; and (3) the Trust is required to comply with Rule 10A–3[12] under the Act for the initial and continued listing of the Shares of the Fund. In addition, the Exchange represents that the Shares of the Fund will comply with all other requirements applicable to Units including, but not limited to, requirements relating to the dissemination of key information such as the value of the New Index and the applicable Intraday Indicative Value ("IIV"),[13] rules governing the trading of equity securities, trading hours, trading halts, surveillance, information barriers and the Information Bulletin to Equity Trading Permit Holders ("ETP Holders"), as set forth in Exchange rules applicable to Units and prior Commission orders approving the generic listing rules applicable to the listing and trading of Units.[14]

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[8] The changes described herein with respect to use of the New Index will be effective upon: (1) Approval by the Trust's Board; (2) shareholders' receipt of sixty days written notice of the proposed change; and (3) completing a filing with the Commission of another amendment to the Trust's Registration Statement, or a prospectus supplement reflecting these changes. The Adviser represents that the Adviser has managed and will continue to manage the Fund in the manner described in the Registration Statement and will not implement the changes described herein until this proposed rule change is operative.

[9] The description of the New Index is based on information provided by Bank of America ("BofA") Merrill Lynch. BofA Merrill Lynch is the "Index Provider" with respect to the Underlying Index and the New Index. The Index Provider is a broker-dealer and has implemented a firewall with respect to and will maintain procedures designed to prevent the use and dissemination of material non-public information regarding the New Index.

[10] Information concerning constituent bond prices, timing and conventions is provided in the BofA Merrill Lynch Bond Index Guide, which can be accessed on Bloomberg (IND2[go], 4[go]) [sic].

[11] Commentary .02(a)(4) to NYSE Arca Equities Rule 5.2(j)(3) provides that no component fixed-income security (excluding Treasury Securities and GSE Securities, as defined therein) shall represent more than 30% of the weight of the index or portfolio, and the five most heavily weighted component fixed-income securities in the index or portfolio shall not in the aggregate account for more than 65% of the weight of the index or portfolio.

[12] 17 CFR 240.10A–3.

The current value of the New Index is widely disseminated by one or more major market data vendors at least once per day, as required by NYSE Arca Equities Rule 5.2(j)(3), Commentary .02(b)(ii). The IIV for Shares of the Fund is disseminated by one or more major market data vendors, updated at least every 15 seconds during the Exchange's Core Trading Session, as required by NYSE Arca Equities Rule 5.2(j)(3), Commentary .02(c). The components and percentage weightings of the New Index are also available from major market data vendors. In addition, the portfolio of securities held by the Fund is disclosed daily on the Fund's Web site at *www.invescopowershares.com.*

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)[15] that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NYSE Arca Equities Rule 5.2(j)(3). The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by the Exchange or the Financial Industry Regulatory Authority ("FINRA") on behalf of the Exchange, which are designed to detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.[16] The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange. The Exchange or FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares with other markets that are members of the Intermarket Surveillance Group ("ISG"). In addition, the Exchange will communicate as needed regarding trading in the Shares with other markets that are members of the ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. The Index Provider is a broker-dealer and has implemented a firewall and will maintain procedures designed to prevent the use and dissemination of material non-public information regarding the New Index.

As discussed above, the Exchange believes that the New Index is sufficiently broad-based to deter potential manipulation. As of February 4, 2016, approximately 84.39% of the weight of the New Index components was composed of individual maturities that were part of an entire municipal bond offering with a minimum original principal amount outstanding of $100 million or more for all maturities of the offering. In addition, as of February 4, 2016, the total dollar amount outstanding of issues in the New Index was approximately $281,589,346,769 and the average dollar amount outstanding of issues in the Index was approximately $27,808,547. Further, the most heavily weighted component represents 2.27% of the weight of the New Index and the five most heavily weighted components represent 6.33% of the weight of the New Index.[17] Therefore, the Exchange believes that, notwithstanding that the New Index does not satisfy the criterion in NYSE Arca Equities Rule 5.2(j)(3), Commentary .02(a)(2), the Index is sufficiently broad-based to deter potential manipulation, given that it is composed of approximately 10,126 issues and 1,811 unique issuers. In addition, the New Index securities are sufficiently liquid to deter manipulation in that a substantial portion (84.39%) of the New Index weight is composed of maturities that are part of a minimum original principal amount outstanding of $100 million or more for all the maturities of the offering, and in view of the substantial total dollar amount outstanding and the average dollar amount outstanding of New Index issues, as referenced above.

The New Index value, calculated and disseminated at least once daily, as well as the components of the Index and their percentage weightings, will be available from major market data vendors. In addition, the portfolio of securities held by the Fund will be disclosed on the Fund's Web site. The IIV for Shares of the Fund will be disseminated by one or more major market data vendors, updated at least every 15 seconds during the Exchange's Core Trading Session.

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that a large amount of information is publicly available regarding the Fund and the Shares, thereby promoting market transparency. The Fund's portfolio holdings will be disclosed on the Fund's Web site daily after the close of trading on the Exchange and prior to the opening of trading on the Exchange the following day. Moreover, the IIV for Shares of the Fund will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Exchange's Core Trading Session. The current value of the New Index will be disseminated by one or more major market data vendors at least once per day. Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services, and quotation and last sale information will be available via the CTA high-speed line. The Web site for the Fund will include the prospectus for the Fund and additional data relating to net asset value ("NAV") and other applicable quantitative information. Moreover, prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. If the Exchange becomes aware that the NAV is not being disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV is available to all market participants. With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. If the applicable IIV, and the New Index value are not being disseminated as required, the Corporation may halt trading during the day in which the interruption to the dissemination of the IIV or New Index value occurs. If the interruption to the dissemination of the IIV or New Index value persists past the trading day in which it occurred, the Corporation will halt trading. Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable, and trading in the Shares will be subject to NYSE Arca Equities Rule 7.34, which sets forth circumstances under which Shares of the Fund may be halted. In addition, investors will have ready access to information regarding the applicable IIV, and quotation and last sale information for the Shares. Trade price and other information relating to municipal bonds is available through the Municipal Securities Rulemaking Board's Electronic Municipal Market Access ("EMMA") system.

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[13] The IIV will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Exchange's Core Trading Session of 9:30 a.m. to 4:00 p.m., Eastern time. Currently, it is the Exchange's understanding that several major market data vendors display and/or make widely available IIVs taken from the Consolidated Tape Association ("CTA") or other data feeds.

[14] *See, e.g.,* Securities Exchange Act Release Nos. 55783 (May 17, 2007), 72 FR 29194 (May 24, 2007) (SR–NYSEArca–2007–36) (order approving NYSE Arca generic listing standards for Units based on a fixed income index); 44551 (July 12, 2001), 66 FR 37716 (July 19, 2001) (SR–PCX–2001–14) (order approving generic listing standards for Units and Portfolio Depositary Receipts); 41983 (October 6, 1999), 64 FR 56008 (October 15, 1999) (SR–PCX–98–29) (order approving rules for listing and trading of Units).

[15] 15 U.S.C. 78f(b)(5).

[16] FINRA conducts cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

[17] Commentary .02(a)(4) to NYSE Arca Equities Rule 5.2(j)(3) provides that no component fixed-income security (excluding Treasury Securities and GSE Securities, as defined therein) shall represent more than 30% of the weight of the index or portfolio, and the five most heavily weighted component fixed-income securities in the index or portfolio shall not in the aggregate account for more than 65% of the weight of the index or portfolio.

All statements and representations made in this filing regarding (a) the description of the Fund's portfolio, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange rules and surveillance procedures shall constitute continued listing requirements for listing the Shares on the Exchange. The Adviser has represented to the Exchange that it will advise the Exchange of any failure by the Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Rule 5.5(m).

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the continued listing and trading of exchange-traded products that principally hold municipal bonds and that will enhance competition among market participants, to the benefit of investors and the marketplace. The Exchange has in place surveillance procedures relating to trading in the Shares and may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement. In addition, investors will have ready access to information regarding the IIV and quotation and last sale information for the Shares.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act. The Exchange notes that the proposed rule change will facilitate the continued listing and trading of an exchange-traded product that holds municipal securities and will enhance competition among market participants, to the benefit of investors and the marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will: (a) By order approve or disapprove such proposed rule change; or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2016–62 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca-2016–62. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2016–62 and should be submitted on or before June 13, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–12016 Filed 5–20–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–77845; File No. SR–NYSEArca–2016–08]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, To Adopt NYSE Arca Equities Rule 8.900 To Permit Listing and Trading of Managed Portfolio Shares and To Permit Listing and Trading of Shares of Fifteen Issues of the Precidian ETFs Trust

May 17, 2016.

On January 27, 2016, NYSE Arca, Inc. (“Exchange” or “NYSE Arca”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)[1] and Rule 19b–4 thereunder,[2] a proposed rule change to: (1) Adopt NYSE Arca Equities Rule 8.900; and (2) approve the listing and trading of shares (“Shares”) of fifteen issues of the Precidian ETFs Trust (“Trust”). The proposed rule change was published for comment in the **Federal Register** on February 18, 2016.[3] On March 9, 2016, the Exchange filed Amendment No. 1 to the proposed rule change.[4] The Commission has received four comments on the proposed rule change.[5] This order institutes proceedings under Section 19(b)(2)(B) of the Act[6] to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1 thereto.

I. Summary of the Exchange’s Description of the Proposed Rule Change

The Exchange proposes to adopt new NYSE Arca Equities Rule 8.900, which would govern the listing and trading of “Managed Portfolio Shares.”[7] The Exchange also proposes to list and trade the Shares of the following funds under proposed NYSE Arca Equities Rule 8.900: (1) Precidian U.S. Managed Volatility Fund; (2) Precidian Strategic Value; (3) Precidian Large Cap Value; (4) Precidian Focused Dividend Strategy; (5) Precidian U.S. Large Cap Growth; (6) Precidian U.S. Core Equity; (7) Precidian U.S. Mid Cap Growth; (8) Precidian Total Return; (9) Precidian High Dividend Yield; (10) Precidian Small Cap Dividend Value; (11) Precidian Multi-factor Small Cap Core; (12) Precidian Multi-factor Small Cap Growth; (13) Precidian Large Cap Core Plus 130/30; (14) Precidian Mid Cap Core Plus 130/30; and (15) Precidian Small Cap Core Plus 130/30 (each a “Fund,” and collectively the “Funds”). In addition, the Exchange proposes to amend NYSE Arca Equities Rule 7.34 (Trading Sessions), which relates to securities traded on the Exchange during the Core Trading Session, to add a reference to proposed NYSE Arca Equities Rule 8.900.

A. Key Features of Managed Portfolio Shares

While Investment Companies issuing Managed Portfolio Shares would be actively-managed, and in that respect would be similar to those issuing Managed Fund Shares,[8] Managed Portfolio Shares would differ from Managed Fund Shares in the following respects.

- First, issues of Managed Fund Shares are required to disseminate their “Disclosed Portfolio” at least once daily.[9] By contrast, the portfolio for an issue of Managed Portfolio Shares would be disclosed only quarterly.
- Second, in connection with the redemption of shares in “Redemption Unit” size (as described below), the delivery of any portfolio securities in kind would only be effected through a “Confidential Account” (as described below) for the benefit of the redeeming authorized participant without disclosing the identity of the securities to the authorized participant.
- Third, for each series of Managed Portfolio Shares, a Verified Intraday Indicative Value (“VIIV”) would be disseminated by one or more major market-data vendors every second during the Exchange’s Core Trading Session (normally, 9:30 a.m. to 4:00 p.m., Eastern Time (“E.T.”)).[10] The Exchange states that dissemination of the VIIV will allow investors to determine the estimated intra-day value of the underlying portfolio of a series of Managed Portfolio Shares and will provide a close estimate of that value throughout the trading day.[11]

B. Arbitrage of Managed Portfolio Shares

The Exchange asserts that market makers will be able to make efficient and liquid markets priced near the VIIV even without daily disclosure of a

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[18] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 76944 (Feb. 11, 2016), 81 FR 8269 (“Notice”).

[4] In Amendment No. 1 to the proposed rule change, the Exchange corrected the citations to the Trust’s Form N–1A and Exemptive Application, which were misstated in the proposal. Because Amendment No. 1 is technical in nature and does not materially alter the substance of the proposed rule change or raise any novel regulatory issues, it is not subject to notice and comment. Amendment No. 1 to the proposed rule change is available on the Commission’s Web site at: ***http://www.sec.gov/comments/sr-nysearca-2016-08/nysearca201608-1.pdf.***

[5] *See* Letter from Gary L. Gastineau, President, ETF Consultants.com, Inc., to Brent J. Fields, Secretary, Commission, dated Mar. 10, 2016 (“Gastineau Letter”); Letter from David Nadig (Mar. 31, 2016) (“Nadig Letter”); Letter from Andrew M. Gross, Jr. (Apr. 5, 2016) (“Gross Letter”); Letter from Andrew M. Gross, Jr. (Apr. 5, 2016) (“Gross Letter”); Letter from Joseph A. Sullivan, Chairman and Chief Executive Officer, Legg Mason Global Asset Management, to Mary Jo White, Chair, Commission (Apr. 15, 2016) (“Sullivan Letter”). The comment letters are available on the Commission’s Web site at: ***https://www.sec.gov/comments/sr-nysearca-2016-08/nysearca201608.shtml.***

[6] 15 U.S.C. 78s(b)(2)(B).

[7] Proposed NYSE Arca Equities Rule 8.900(c)(1) defines the term “Managed Portfolio Share” as a security that (a) is issued by a registered investment company organized as an open-end management investment company (“Investment Company”) or similar entity, that invests in a portfolio of securities selected by the Investment Company’s investment adviser consistent with the Investment Company’s investment objectives and policies; and (b) when aggregated in a number of shares equal to a Redemption Unit (as defined herein) or multiples thereof, may be redeemed at the request of an authorized participant (as defined in the Investment Company’s Form N–1A filed with the Commission), which authorized participant will be paid though a confidential account established for its benefit a portfolio of securities and/or cash with a value equal to the next determined net asset value (“NAV”).

[8] Managed Fund Shares are shares of actively-managed Investment Companies listed and traded under NYSE Arca Equities Rule 8.600.

[9] NYSE Arca Equities Rule 8.600(c)(2) defines the term “Disclosed Portfolio” as the identities and quantities of the securities and other assets held by the Investment Company that will form the basis for the Investment Company’s calculation of net asset value at the end of the business day. NYSE Arca Equities Rule 8.600(d)(2)(B)(i) requires that, for Managed Fund Shares, the Disclosed Portfolio will be disseminated at least once daily and will be made available to all market participants at the same time.

[10] Proposed NYSE Arca Equities Rule 8.900(c)(2) defines the VIIV as the estimated indicative value of a Managed Portfolio Share based on all of the issuer’s holdings as of the close of business on the prior business day, priced and disseminated in one second intervals, and subject to validation by a pricing verification agent of the Investment Company that is responsible for comparing multiple independent pricing sources to establish the accuracy of the VIIV. The specific methodology for calculating the VIIV will be disclosed on each Fund’s Web site.

[11] According to the Exchange, the VIIV should not be viewed as a “real-time” update of the NAV per Share of each Fund, because the VIIV may not be calculated in the same manner as the NAV, which will be computed once a day, generally at the end of the business day.

Fund's underlying portfolio, as long as a VIIV is disseminated every second and market makers have knowledge of a Fund's means of achieving its investment objective. According to the Exchange, market makers would have knowledge of a Fund's means of achieving its investment objective by employing risk-management techniques such as "statistical arbitrage."[12] The Exchange also states that market makers will make efficient markets in Managed Portfolio Shares by establishing a Confidential Account (as defined herein), monitoring the VIIV for arbitrage opportunities, and effecting transactions in the Shares and the Fund's (unknown) portfolio securities, as described below.

According to the Exchange, if an authorized participant believes that Shares of a Fund are trading at a price that is higher than the value of the underlying portfolio—for example, if the market price for the Shares is higher than the VIIV—then the authorized participant may sell Shares of the Fund short and instruct its "Trusted Agent"[13] to buy portfolio securities for its Confidential Account. When the market price of the Shares falls in line with the value of the portfolio, the authorized participant can then close out its positions in both the Shares and the portfolio securities. According to the Exchange, the authorized participant's purchase of the portfolio securities into its Confidential Account, combined with the sale of Shares, may also create downward pressure on the price of Shares and/or upward pressure on the price of the portfolio securities, bringing the market price of Shares and the value of a Fund's portfolio securities closer together.

Similarly, according to the Exchange, an authorized participant could buy Shares and instruct the Trusted Agent to sell the underlying portfolio securities from its Confidential Account in an attempt to profit when a Fund's Shares are trading at a discount to its portfolio. According to the Exchange, the authorized participant's purchase of a Fund's Shares in the secondary market, combined with the sale of the portfolio securities from its Confidential Account, may also create upward pressure on the price of Shares and/or downward pressure on the price of portfolio securities, driving the market price of Shares and the value of a Fund's portfolio securities closer together. The Exchange states that, Precidian Funds LLC ("Adviser"), the investment adviser to the Trust, avers that this process is identical to how many authorized participants currently arbitrage existing traditional ETFs, except for the use of the Confidential Account.

According to the Exchange, a market maker that is not an authorized participant would also be able to establish a Confidential Account and could engage in arbitrage activity without using the creation or redemption processes described above. If such a market maker believes that a Fund is overvalued relative to its underlying assets, the Exchange states, that market maker could sell Shares short and instruct its Trusted Agent to buy portfolio securities in its Confidential Account and then wait for the trading prices to move toward parity and close out the positions in both the Shares and the portfolio securities to realize a profit from the relative movement of their trading prices. Similarly, according to the Exchange, this market maker could buy Shares and instruct the Trusted Agent to sell the underlying portfolio securities in an attempt to profit when a Fund's Shares are trading at a discount to a Fund's underlying or reference assets.

C. The Creation and Redemption Procedures

The Exchange states that, generally, Shares will be purchased and redeemed on an in-kind basis, so that, except where the purchase or redemption will include cash under the limited circumstances described in the Registration Statement, purchasers will be required to purchase Creation Units by making an in-kind deposit of specified instruments ("Deposit Instruments"), and shareholders redeeming their Shares will receive an in-kind transfer of specified instruments ("Redemption Instruments"). On any given Business Day, the names and quantities of the instruments that constitute the Deposit Instruments and the names and quantities of the instruments that constitute the Redemption Instruments will be identical, and these instruments may be referred to, in the case of either a purchase or a redemption, as the "Creation Basket."

In the case of a redemption, a Fund's custodian ("Custodian") will typically deliver securities to the Confidential Account on a pro rata basis with a value approximately equal to the value of the Shares tendered for redemption at the Cut-Off time. The Custodian will make delivery of the securities by appropriate entries on its books and records transferring ownership of the securities to the authorized participant's Confidential Account, subject to delivery of the Shares redeemed. The Trusted Agent of the Confidential Account will in turn liquidate, hedge, or otherwise manage the securities based on instructions from the authorized participant.[14]

If the Trusted Agent is instructed to sell all securities received at the close on the redemption date, the Trusted Agent will pay the liquidation proceeds net of expenses, plus or minus any cash balancing amount, to the authorized participant through DTC.[15] The redemption securities that the Confidential Account receives is expected to mirror the portfolio holdings of a Fund *pro rata*.

F. Availability of Information

Each Fund will be required to file with the Commission its complete portfolio schedules for the second and fourth fiscal quarters on Form N–SAR under the 1940 Act, and to file its complete portfolio schedules for the first and third fiscal quarters on Form

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[12] According to the Exchange, statistical arbitrage enables a trader to construct an accurate proxy for another instrument, allowing the trader to hedge the other instrument or buy or sell the instrument when it is cheap or expensive in relation to the proxy. Statistical analysis permits traders to discover correlations based purely on trading data without regard to other fundamental drivers. These correlations are a function of differentials, over time, between one instrument or group of instruments and one or more other instruments. Once the nature of these price deviations has been quantified, a universe of securities is searched in an effort to, in the case of a hedging strategy, minimize the differential. Once a suitable hedging proxy has been identified, a trader can minimize portfolio risk by executing the hedging basket. The trader then can monitor the performance of this hedge throughout the trade period making correction where warranted.

[13] Proposed Commentary .04 to NYSE Arca Equities Rule 8.900 requires that authorized participants and non-authorized participant market makers redeeming Managed Portfolio Shares sign an agreement with an agent ("Trusted Agent") to establish a confidential account ("Confidential Account"), for the benefit of such authorized participant or non-authorized participant market maker, that will receive all consideration from the issuer in a redemption. A Trusted Agent may not disclose the consideration received in a redemption except as required by law or as provided in the Investment Company's Form N–1A, as applicable.

[14] An authorized participant will issue execution instructions to the Trusted Agent and be responsible for all associated profit or losses. Like a traditional ETF, the authorized participant has the ability to sell the basket securities at any point during normal trading hours.

[15] According to the Exchange, under applicable provisions of the Internal Revenue Code, the authorized participant is expected to be deemed a "substantial owner" of the Confidential Account because it receives distributions from the Confidential Account. As a result, the Exchange states, all income, gain, or loss realized by the Confidential Account will be directly attributed to the authorized participant. The Exchange also states that, in a redemption, the authorized participant will have a basis in the distributed securities equal to the fair market value at the time of the distribution, and any gain or loss realized on the sale of those Shares will be taxable income to the authorized participant.

N–Q under the 1940 Act, within 60 days of the end of the quarter. Form N–Q requires funds to file the same schedules of investments that are required in annual and semi-annual reports to shareholders. The Trust's SAI and each Fund's shareholder reports will be available free upon request from the Trust. These documents and forms may be viewed on-screen or downloaded from the Commission's Web site at *www.sec.gov.*

In addition, the VIIV, as defined in proposed NYSE Arca Equities Rule 8.900(c)(3), will be widely disseminated by one or more major market-data vendors at least every second during the Exchange's Core Trading Session. The VIIV, which is approximate value of each Fund's investments on a per Share basis, will be disseminated every second during the Exchange's Core Trading Session through the facilities of the CTA. According to the Exchange, the VIIV will include all accrued income and expenses of a Fund and will assure that any extraordinary expenses, booked during the day, that would be taken into account in calculating a Fund's NAV for that day are also taken into account in calculating the VIIV. For purposes of the VIIV, securities held by a Fund will be valued throughout the day based on the mid-point between the disseminated current national best bid and offer. According to the Exchange, by utilizing the mid-point pricing for purposes of VIIV calculation, stale prices are eliminated and more accurate representation of the real-time value of the underlying securities is provided to the market. Specifically, according to the Exchange, quotations based on the mid-point of bid/ask spreads more accurately reflect current market sentiment by providing real time information on where market participants are willing to buy or sell securities at that point in time. Using quotations rather than last-sale information addresses concerns regarding the staleness of pricing information of less actively traded securities. The Exchange represents that, because quotations are updated more frequently than last-sale information especially for inactive securities, the VIIV will be based on more current and accurate information. The Exchange also represents that the use of quotations will also dampen the impact of any momentary spikes in the price of a portfolio security.

Each Fund will utilize two independent pricing sources to provide two independent sources of pricing information. Each Fund will also utilize a "Pricing Verification Agent" and establish a computer-based protocol that will permit the Pricing Verification Agent to continuously compare the two data streams from the independent pricing agents sources on a real time basis.[16] A single VIIV will be disseminated publicly for each Fund; however, the Pricing Verification Agent will continuously compare the public VIIV against a non-public alternative intra-day indicative value to which the Pricing Verification Agent has access. If it becomes apparent that there is a material discrepancy between the two data streams, the Exchange will be notified and have the ability to halt trading in a Fund until the discrepancy is resolved.[17] Each Fund's Board will review the procedures used to calculate the VIIV and maintain its accuracy as appropriate, but not less than annually. The specific methodology for calculating the VIIV will be disclosed on each Fund's Web site.

III. Summary of Comment Letters

The Commission has received four comment letters on the proposed rule change.[18]

A. *Gastineau Letter.*[19] The commenter opposes approval of the proposed rule change and recommends imposition of a number of requirements in the event the proposed rule change and the Exemptive Application are approved. Preliminarily, the commenter offers an opinion regarding the standard of review that should be applied, stating that, because this would be a new and potentially ground breaking less-transparent ETF structure, the Commission should apply a meaningfully higher standard until the Commission is completely comfortable with the state of the ETF market.

Generally, the commenter asserts that market makers will face significant impediments to successfully arbitraging the Shares, and he predicts that this will lead to the Shares trading at wider bid-ask spreads and more variable premiums/discounts than actively-managed ETFs available today.

In evaluating the Exchange's statements regarding VIIVs, the commenter asserts that their utility should be compared not to the IIVs of existing ETFs but rather to the independently derived, real-time estimates of underlying fund value that ETF market makers use to identify arbitrage opportunities and manage the risk of holding ETF positions today ("MM IIVs"). The commenter asserts that, because existing actively managed ETFs (and most index ETFs) provide full daily disclosure of their current portfolio, their market makers have access to far better information about the current value of Fund holdings than the proposed VIIVs would provide and, correspondingly, VIIVs will be significantly less precise than MM IIVs. The commenter also asserts that MM IIVs include significant information that would not be reflected in VIIVs, noting:

- In calculating VIIVs, Fund securities would be valued based on the midpoint between the current national best bid and offer quotations. The commenter characterizes the bid-ask midpoint as a "fairly crude valuation metric" that does not capture important trading information incorporated into MM IIVs, such as the current bid-ask spread, the depth of the current order book on the bid and offer side of the market, and the predominance of current trading between bid-side and offer-side transactions.
- VIIVs would be calculated and disseminated every second and, while this interval may seem sufficient, MM IIVs are updated in fractions of a second (milliseconds or microseconds).
- The VIIV verification process would leave significant room for dissemination of erroneous values. For example, a Fund's Pricing Verification Agent would take no action to address observed discrepancies in VIIV input prices until the calculated Fund values differ by at least 25 bps for 60 seconds. The commenter characterizes that disparity as "huge," asserting that it would be wider than the customary bid-ask spread of most domestic equity ETFs.
- The VIIV process would not address all potential intraday valuation errors. The commenter describes that corporate actions must be accurately reflected in the VIIV, which can be challenging, and

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[16] A Fund's Custodian will provide, on a daily basis, the constituent basket file comprised of all securities plus any cash to the independent pricing agent(s) for purposes of pricing.

[17] Proposed Rule 8.900(d)(2)(C) provides that, upon notification to the Corporation by the Investment Company or its agent that (i) the prices from the multiple independent pricing sources to be validated by the Investment Company's pricing verification agent differ by more than 25 basis points for 60 seconds in connection with pricing of the VIIV, or (ii) that the VIIV of a series of Managed Portfolio Shares is not being priced and disseminated in one-second intervals, as required, the Corporation will halt trading in the Managed Portfolio Shares as soon as practicable. The halt in trading would continue until the Investment Company or its agent notifies the Corporation that the prices from the independent pricing sources no longer differ by more than 25 basis points for 60 seconds or that the VIIV is being priced and disseminated as required. The Investment Company or its agent would be responsible for monitoring that the VIIV is being priced and disseminated as required and whether the prices to be validated from multiple independent pricing sources differ by more than 25 basis points for 60 seconds.

[18] *See supra* note 5.

[19] The Gastineau Letter is available at: *http://www.sec.gov/comments/sr-nysearca-2016-08/nysearca201608-2.pdf.*

market makers would not be able to verify that corporate actions are appropriately reflected in a Fund's VIIVs because of the non-transparent portfolio.

- The process for adjusting VIIVs in the event of trading halts in portfolio securities is cumbersome and likely to result in errors in disseminated VIIVs. Throughout a halt, which may be protracted, the Fund would continue to disseminate VIIVs that do not reflect fair values of the halted security, and therefore may vary significantly from the Fund's true underlying value at that time. The commenter asserts that MM IIVs would almost certainly arrive at a fair estimate of a Fund's current underlying value far faster than the VIIV specified process.

The commenter asserts that reliance on faulty VIIVs may expose market makers to unrecoverable losses, noting that: (1) Neither the Exchange nor its agents nor the Reporting Authority would be liable for disseminating erroneous VIIVs; and (2) the circumstances under which the Independent Pricing Agents and the Pricing Verification Agent are legally liable for such errors are limited.

According to the commenter, market makers' forced reliance on VIIVs to determine intraday Fund valuations is a source of significant incremental risk for them versus making markets in existing ETFs, and he predicts that this will result in the Shares trading at wider bid-ask spreads and more variable premiums and discounts to NAV than similar existing ETFs.

The commenter also criticizes the Confidential Accounts structure. He asserts that, compared to the usual manner in which market makers in existing ETFs engage in arbitrage and buy and sell Creation Basket instruments, the Confidential Accounts arrangement exposes market makers to significant additional costs, risks and lost opportunities, including:

- Less control over trade execution and trade order management when implementing portfolio hedging and Creation Unit transactions, which will result in more cost and risk, and less profit opportunity.
- No ability for market makers to use their market knowledge and market positions to enhance arbitrage profits and minimize costs.
- Reduced incentive for third-party service providers to trade expeditiously and with low market impact.
- Little or no ability for market makers to monitor trading in Confidential Accounts to ensure best execution or to evaluate trading performance.
- Forced *pro rata* hedging, which, the commenter states, is very often not the best hedge. Sub-optimal hedging results in less efficient arbitrage.
- Given the more-involved routing of trade instructions and trade orders that the Confidential Account structure would necessitate, the commenter states that hedging and Creation Unit instrument transactions through Confident Accounts will almost certainly take longer, on average, for a market maker to execute than similar transactions that the market maker executes internally. According to the commenter, slower executions may translate into less efficient arbitrage.
- Potentially significant explicit costs to establish and maintain Confidential Accounts.

Additionally, the commenter discusses the efficiency of statistical arbitrage. While market makers may be able to gain some useful information about a Fund's current composition by knowing the Fund's investment objective and tracking performance correlations over time versus a known index, the commenter states that the amount of portfolio information that can be gleaned using this approach is limited. As a result, any portfolio hedge constructed using this information would be subject to meaningful basis risk.

The commenter also expresses concern regarding portfolio information security in light of the dissemination of this data across a network of Trusted Agents, affiliated broker-dealers and other Confidential Account service providers, and their use of the provided information to implement trades on behalf of Confidential Account holders.

The commenter also raises concerns with the possibility that market participants could use the VIIV to reverse-engineer the Funds' portfolio holdings, subjecting the Funds to the dilutive effects of front-running. The commenter asserts that "it is far from a settled question that the Funds would not ever be susceptible to reverse engineering."

B. *Nadig Letter.*[20] This commenter states his support of the proposal, noting that, after having been through multiple variations, the proposal now has the correct VIIV structure.

C. *Gross Letter.*[21] This commenter first notes the advantages that ETFs offer to retail investors, and supports the idea of investing in actively managed funds, stating that live, intra-day pricing of the underlying portfolio enables the commenter to see how the portfolio value is performing at all times (as opposed to mutual funds), enables market participants to provide liquidity for the product (with the ability to arbitrage price discrepancies by creating and redeeming shares in the portfolio, as with existing ETFs), and allows for purchases and sales of shares at any time. With wider intra-day trading ranges recently, the ability to put in limit buy orders below the market (or limit sell orders above the market) is critical to the commenter.

In addition, the commenter notes that actively managed ETFs provide benefits to the fund manager and to fund performance. The commenter states that actively managed ETFs allow fund managers to make investment decisions they believe in, without being distorted by tax consequences. In addition, the commenter believes that the proposed Funds have come up with a way to provide retail and professional investors with a level playing field in terms of intra-day price feeds on the value of the underlying portfolio, and through a trusted agent to allow market makers to create and redeem (and hold) the portfolio of the actively managed fund without being able to see the individual share holdings. The commenter finds this proposal to be an "elegant solution" and to be an effective way to both use the well-understood arbitrage mechanism that has made ETFs liquid and reliable products and allow market makers to control execution of their fund portfolios while protecting the confidentiality of the fund manager.

D. *Sullivan Letter.*[22] The commenter expresses support for the proposed rule change. He states that the Precidian structure would permit his firm's portfolio managers to manage active ETFs using their proprietary strategies without being susceptible to front running by other managers or investors and while still offering the following benefits of active ETFs to clients, which would positively impact yields and net investor returns: (1) The ability to trade shares throughout the day at known prices; (2) lower fund operating expenses, primarily in the form of lower transfer agency costs and overall portfolio transaction costs; and (3) improved tax efficiency. According to the commenter, his firm's clients realize only a modest benefit from daily transparency. The commenter also mentioned that his firm is a shareholder in Precidian.

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[20] The Nadig Letter is available at: *http://www.sec.gov/comments/sr-nysearca-2016-08/nysearca201608-3.htm.*

[21] The Gross Letter is available at: *http://www.sec.gov/comments/sr-nysearca-2016-08/nysearca201608-4.htm.*

[22] The Sullivan Letter is available at: *http://www.sec.gov/comments/sr-nysearca-2016-08/nysearca201608-5.pdf.*

IV. Proceedings To Determine Whether To Approve or Disapprove SR–NYSEArca–2016–08 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act[23] to determine whether the proposed rule change, as modified by Amendment No. 1 thereto, should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[24] the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade," and "to protect investors and the public interest."[25]

V. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Section 6(b)(5) or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[26]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by June 13, 2016. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by June 27, 2016. The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, which are set forth in the Notice[27] and in Amendment No. 1 to the proposed rule change,[28] in addition to any other comments they may wish to submit about the proposed rule change. Specifically, the Commission seeks comment on the statements of the Exchange contained in the Notice, as modified by Amendment No. 1 thereto, and any other issues raised by the proposed rule change. In particular, the Commission seeks comment on the following:

1. Do commenters believe that market makers will be able to engage in effective and efficient arbitrage in the Shares without knowledge of the contents of the Funds' portfolios? Do commenters believe that market makers will be able to engage in effective and efficient arbitrage in the Shares while delegating trading in the portfolio securities to an intermediary, rather than trading in those securities directly? Do commenters believe that the Shares of a Fund will trade at secondary market prices that are closely aligned with the value of the Fund's portfolio?

2. Do commenters believe that the trading characteristics—such as bid/ask spread and premium or discount to NAV—of a Fund will be comparable to the trading characteristics of a fully transparent ETF with similar assets and a similar strategy?

3. What are commenters' views concerning the proposed use of a VIIV as opposed to the IIV commonly used by other ETFs? Do commenters believe that the VIIV will provide sufficient information to market participants to ensure that the Funds are appropriately priced in secondary trading? Do commenters believe that the VIIV will provide sufficient information to market participants in periods of market volatility, including periods in which securities underlying a Fund's portfolio encounter trading halts or pauses? Do commenters believe that the proposed parameters that apply to the accuracy of the VIIV—*i.e.*, the requirement that the two independent calculations not disagree by more than 25 basis points for 60 seconds or more—are appropriate?

4. What are commenters views regarding whether market participants will be able to use the VIIV—by itself or in conjunction with other public data—to reverse engineer a Fund's portfolio holdings? What factors might affect the susceptibility of a Fund to such reverse engineering? If such reverse engineering were possible, what effect would it have on the Fund? What effect would reverse engineering have on shareholders in the Fund?

5. What are commenters views about the selective disclosure of portfolio holdings to the Trusted Agents, as described above?

6. In light of the non-transparency of the basket of securities underlying the proposed Funds, the Commission seeks comment on how a broker-dealer authorized participant engaging in creation and redemption activity might fulfill its obligation to maintain a minimum level of net capital in compliance with Rule 15c3–1 under the Act and how such an authorized participant would comply with the books and records requirements of Rules 17a–3 and 17a–4 under the Act. For example, how would an authorized participant that is a broker-dealer apply an appropriate haircut to positions included in the Creation Basket when the authorized participant is unaware of the securities included in the basket? In addition, how would the authorized participant determine an appropriate price for such securities? Moreover, how would such an authorized participant make and keep current the records required under Rule 17a–3, including the daily blotter and daily stock record required under paragraphs (a)(1) and (a)(5), respectively, of that rule?

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2016–08 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

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[23] 15 U.S.C. 78s(b)(2)(B).

[24] *Id.*

[25] 15 U.S.C. 78f(b)(5).

[26] Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94–29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[27] *See supra* note 3.

[28] *See supra* note 4.

All submissions should refer to File Numbers SR–NYSEArca–2016–08. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of these filings also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2016–08 and should be submitted on or before June 13, 2016. Rebuttal comments should be submitted by June 27, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[29]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–12028 Filed 5–20–16; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF STATE

[Public Notice: 9562]

30-Day Notice of Proposed Information Collection; Reporting Requirements on Responsible Investment in Burma; Correction

AGENCY: Department of State.

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information; correction.

SUMMARY: The Department of State published a **Federal Register** Notice on May 17, 2016, notifying the public of the new reporting requirement on responsible investment in Burma. The notice contained an incorrect investment amount. This document corrects the investment amount to $5,000,000.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents, to Jennifer Stein, U.S. Department of State, DRL/MLGA Suite L–430, 2400 Virginia Avenue NW., Washington, DC 20037, who may be reached on 202–663–3299 or at *steinjl@state.gov.*

Correction

In the **Federal Register** of May 17, 2016, in FR Doc 2016–3668, on page 30597, in the third column, correct the "Respondents" and "Frequency" bulleted entrys to read:

- *Respondents:* U.S. persons and entities engaged in new investment in Burma in an amount over $5,000,000 in aggregate, per OFAC General License 17, which authorizes new investments in Burma.
- *Frequency:* Within 180 days of new investment in Burma over $5,000,000, annually thereafter.

Dated: May 11, 2016.

Scott Busby,

Deputy Assistant Secretary. Department of State.

[FR Doc. 2016–12055 Filed 5–20–16; 8:45 am]

BILLING CODE 4710–18–P

SURFACE TRANSPORTATION BOARD

[Docket No. AB 6 (Sub-No. 493X)]

BNSF Railway Company—Abandonment Exemption—In Cook County, Ill

On May 3, 2016, BNSF Railway Company (BNSF) filed with the Surface Transportation Board (Board) a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to abandon an approximately 0.89-mile rail line on BNSF's Lumber District Lead beginning just west of Laflin Street at Engineering Station 118+00 and proceeding east along West Cermak Road to the most easterly point at Engineering Station 157+65 and heading north along the Sangamon Street Lead at Engineering Station 163+50, including both legs of the wye, in Chicago, Cook County, Ill. (the Line). The Line traverses United States Postal Zip Code 60608.

BNSF states that the Line does not contain federally granted rights-of-way. Any documentation in BNSF's possession will be made available promptly to those requesting it.

The interest of railroad employees will be protected by the conditions set forth in *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, In Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979).

By issuing this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued by August 19, 2016.

Any offer of financial assistance (OFA) under 49 CFR 1152.27(b)(2) will be due no later than 10 days after service of a decision granting the petition for exemption. Each OFA must be accompanied by a $1,600 filing fee. *See* 49 CFR 1002.2(f)(25).

All interested persons should be aware that, following abandonment, the Line may be suitable for other public use, including interim trail use. Any request for a public use condition under 49 CFR 1152.28 or for trail use/rail banking under 49 CFR 1152.29 will be due no later than June 10, 2016. Each trail request must be accompanied by a $300 filing fee. *See* 49 CFR 1002.2(f)(27).

All filings in response to this notice must refer to Docket No. AB 6 (Sub-No. 493X) and must be sent to: (1) Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001; and (2) Karl Morell, Karl Morell & Associates, Suite 225, 655 Fifteenth Street NW., Washington, DC 20005. Replies to the petition are due on or before June 10, 2016.

Persons seeking further information concerning abandonment procedures may contact the Board's Office of Public Assistance, Governmental Affairs and Compliance at (202) 245–0238 or refer to the full abandonment regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Office of Environmental Analysis (OEA) at (202) 245–0305. Assistance for the hearing impaired is available through the Federal Information Relay Service at 1–800–877–8339.

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by OEA will be served upon all parties of record and upon any other agencies or persons who comment during its preparation. Other interested persons may contact OEA to obtain a copy of the EA (or EIS). EAs in abandonment proceedings normally will be made available within 60 days of the filing of the petition. The deadline for submission of comments on the EA generally will be within 30 days of its service.

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[29] 17 CFR 200.30–3(a)(12).

Board decisions and notices are available on our Web site at *WWW.STB.DOT.GOV.*

Decided: May 18, 2016.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Kenyatta Clay,

Clearance Clerk.

[FR Doc. 2016–12194 Filed 5–20–16; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Ninth Meeting: RTCA Special Committee 230 (SC–230) Airborne Weather Detection Systems (Joint With WG–95 Inflight Ice Long Range Awareness Systems' Fourth Meeting)

AGENCY: Federal Aviation Administration (FAA), U.S. Department of Transportation (DOT).

ACTION: Notice of Ninth RTCA Special Committee 230 Meeting.

SUMMARY: The FAA is issuing this notice to advise the public of the Ninth RTCA Special Committee 230 meeting.

DATES: The meeting will be held June 28–30, 2016 from 9:00 a.m.–5:00 p.m.

ADDRESSES: The meeting will be held at Boeing Everett Facility, Building 40–88, 3003 W. Casino Road, Everett, WA 98204.

FOR FURTHER INFORMATION CONTACT: The RTCA Secretariat, 1150 18th Street NW., Suite 910, Washington, DC 20036, or by telephone at (202) 833–9339, fax at (202) 833–9434, or Web site at *http://www.rtca.org* or Karan Hofmann, Program Director, RTCA, Inc., *khofmann@rtca.org,* (202) 330–0680; Bob Darby, *bob.darby@eurocae.net,* +33 1 40 92 79 26; Luke Tschacher, *Luke.A.Tschacher@boeing.com;* or Camille CARUHEL, *camille.caruhel@airbus.com.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.), notice is hereby given for a meeting of RTCA Special Committee 230. The agenda will include the following:

Tuesday, June 28, 2016

1. Introduction for the WG95–SG (9:00 a.m.–9:30 a.m.)
2. PLENARY MEETING (9:30 a.m.–10:00 a.m.)
3. WG95–SG MEETING (10:00 a.m.–5:00 p.m.)
   a. Review of the Actions
   b. Review of the document and the work plan
   c. Evaluation of the X-Band Radar performance (from 18″ antenna)
   d. Review of the HMI evaluations performed by all the participants

Wednesday, June 29, 2016

1. WG95–SG MEETING (9:00 a.m.–5:00 p.m.)
   a. Assessment of the required alert threshold and the associated operational procedures
   b. Preliminary proposal for HMI standardization (to be validated for October meeting)

Friday, June 30, 2016

1. PLENARY MEETING (9:00 a.m.–10:00 a.m.)
   a. Review of the Progress
   b. Discussion on common Actions
2. WG95–SG (10:00 a.m.–3:00 p.m.)
   a. Update of the Feasibility study report
   b. Meeting wrap-up (update of action list, next meeting scheduling)
3. Conclusion

Attendance is open to the interested public but limited to space availability. If you plan to attend, please email by June 14, 2016. With the approval of the chairman, members of the public may present oral statements at the meeting. Plenary information will be provided upon request. Persons who wish to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on May 12, 2016.

Latasha Robinson,

Management & Program Analyst, NextGen, Enterprise Support Services Division, Federal Aviation Administration.

[FR Doc. 2016–12124 Filed 5–20–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Twenty-Third Meeting: RTCA Special Committee 225 (SC–225) Rechargeable Lithium Battery and Battery Systems

AGENCY: Federal Aviation Administration (FAA), U.S. Department of Transportation (DOT).

ACTION: Notice of Twenty-Third RTCA Special Committee 225 Meeting.

SUMMARY: The FAA is issuing this notice to advise the public of the Twenty-Third RTCA Special Committee 225 meeting.

DATES: The meeting will be held June 23, 2016 from 9:00 a.m.–1:00 p.m.

ADDRESSES: The meeting will be held virtually at *https://rtca.webex.com/rtca/j.php?MTID=m8be8b59d4641b8884a97bf7c861e464e,* Meeting number 636 711 821, Meeting password Batteries1; or join by phone at 1–877–668–4493 call-in toll-free number (US/Canada), 1–650–479–3208 call-in toll number (US/Canada), Access code 636 711 821.

FOR FURTHER INFORMATION CONTACT: The RTCA Secretariat, 1150 18th Street NW., Suite 910, Washington, DC 20036, or by telephone at (202) 833–9339, fax at (202) 833–9434, or Web site at *http://www.rtca.org* or Jennifer Iversen, Program Director, RTCA, Inc., *jiversen@rtca.org,* (202) 330–0662.

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.), notice is hereby given for a meeting of RTCA Special Committee 225. The agenda will include the following:

Thursday, June 23, 2016

1. Introductions and administrative items (including DFO & RTCA Statement) (15 min)
2. Review agenda (10 min)
3. Review and approve summary from the last Plenary (10 min)
4. Review and approve White Paper regarding Probability analysis substitution for formal physical testing of critical design features
5. Ensure all items assigned to the working group are complete (<3 hrs)
6. Approve document for Final Review and Comment (FRAC) (15 min)
7. Establish Agenda, location, and time for next Plenary (10 min)
8. Adjourn

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting. Plenary information will be provided upon request. Persons who wish to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on May 17, 2016.

Latasha Robinson,

Management & Program Analyst, NextGen, Enterprise Support Services Division, Federal Aviation Administration.

[FR Doc. 2016–12125 Filed 5–20–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Forty-Fourth Meeting: RTCA Special Committee 206 (SC–206) Aeronautical Information and Meteorological Data Link Services

AGENCY: Federal Aviation Administration (FAA), U.S. Department of Transportation (DOT).

ACTION: Notice of Forty-Fourth RTCA Special Committee 206 meeting.

SUMMARY: The FAA is issuing this notice to advise the public of the Forty-Fourth RTCA Special Committee 206 meeting.

DATES: The meeting will be held June 13–17, 2016 from 8:30 a.m.–5:00 p.m.

ADDRESSES: The meeting will be held at NAV CANADA, 1601 Tom Roberts Avenue, Gloucester, ON, Canada K1V1E6.

FOR FURTHER INFORMATION CONTACT: The RTCA Secretariat, 1150 18th Street NW., Suite 910, Washington, DC 20036, or by telephone at (202) 833–9339, fax at (202) 833–9434, or Web site at *http://www.rtca.org* or Karan Hofmann, Program Director, RTCA, Inc., *khofmann@rtca.org,* (202) 330–0680.

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.), notice is hereby given for a meeting of RTCA Special Committee 206. The agenda will include the following:

Monday, June 13, 2016

1. Opening Plenary
2. Opening remarks: DFO, RTCA, Chairman, and Host
3. Attendees' introductions
4. Review and approval of meeting agenda
5. Approval of previous meeting minutes (Atlanta, GA)
6. Action item review
   a. Sub-Groups' reports
   b. SG1/6: MASPS
   c. SG4: EDR MOPS
   d. SG5: FIS–B MOPS
   e. SG7: Winds Guidance
7. Industry presentations
   a. 1090 Spectrum Congestion Analysis—FAA
   b. FIS–B Data Source Transition—Harris
8. Sub-Groups meetings (1:00 p.m.)

Tuesday, June 14, 2016

1. Sub-Groups meetings (8:30 a.m.)

Wednesday, June 15, 2016

1. Plenary SG6 MASPS Review for FRAC release (Sub-Group meetings will resume if review ends early) (8:30 a.m.)
2. Sub-Groups meetings (1:00 p.m.)

Thursday, June 16, 2016

1. Sub-Groups meetings (8:30 a.m.)

Friday, June 17, 2016

1. Closing Plenary (8:30 a.m.)
   a. Sub-Groups' reports
   b. Decision to approve SG6 MASPS for FRAC release
   c. Future meetings plans and dates
   d. Industry coordination
   i. WG–76 Briefing
   e. SC–206 action item review
   f. Other business
2. Adjourn (11:00 a.m.)

Attendance is open to the interested public but limited to space availability. If planning to attend in person, please provide the following information as soon as possible: Name, organization, position title, phone number, supervisor name, supervisor contact information, and dates of attendance. With the approval of the chairman, members of the public may present oral statements at the meeting. Plenary information will be provided upon request. Persons who wish to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on May 12, 2016.

Latasha Robinson,

Management & Program Analyst, NextGen, Enterprise Support Services Division, Federal Aviation Administration.

[FR Doc. 2016–12126 Filed 5–20–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Fiscal Year 2015 and 2016 Passenger Ferry Grant Program Project Selections

AGENCY: Federal Transit Administration, Department of Transportation.

ACTION: Passenger Ferry Grant Program announcement of project selections.

SUMMARY: The US. Department of Transportation's (DOT) Federal Transit Administration (FTA) announces the selection of projects with Fiscal Year (FY) 2015 and FY 2016 appropriations for the Passenger Ferry Grant Program (Ferry Program), 49 U.S.C. 5307(h), as authorized by the Moving Ahead for Progress in the 21st Century Act (MAP–21) and the Fixing America's Surface Transportation Act (FAST) Act. MAP–21 authorized $30 million for discretionary allocations in FY 2015 and the FAST Act authorized $30 million for discretionary allocations in FY 2016. Both amounts combined provide a total of $60 million for this program. On August 3, 2015, FTA published a Notice of Funding Availability (NOFA) (80 FR 46093) announcing the availability of Federal funding for the Ferry Program. These program funds will provide financial assistance to support existing ferry service, establish new ferry service, and repair and modernize ferry boats, terminals, and related facilities and equipment. Funds may not be used for operating expenses, planning, or preventive maintenance.

FOR FURTHER INFORMATION CONTACT: Successful applicants should contact the appropriate FTA Regional Office for information regarding applying for the funds or program-specific information. A list of Regional Offices can be found at *www.fta.dot.gov.* Unsuccessful applicants may contact Vanessa Williams, Office of Program Management at (202) 366–4818, email: *Vanessa.williams@dot.gov,* to arrange a proposal debriefing within 30 days of this announcement. A TDD is available at 1–800–877–8339 (TDD/FIRS).

SUPPLEMENTARY INFORMATION: In response to the NOFA, FTA received 21 proposals from 10 states and the U.S. Virgin Islands requesting $98.1 million in Federal funds, indicating significant demand to fund ferry capital projects. Project proposals were evaluated based on each applicant's responsiveness to the program evaluation criteria outlined in the NOFA. FTA is funding 18 projects as shown in Table 1 for a total of $58,974,323 million. Grantees selected for competitive discretionary funding should work with their FTA Regional Office to finalize the grant application in FTA's Transit Award Management System (TrAMs) for the projects identified in the attached table to quickly obligate funds. Grant applications must only include eligible activities applied for in the original project application. Funds must be used consistent with the competitive proposal and for the eligible capital purposes established in the NOFA and described in the FTA's Urbanized Area Formula Program Circular 9030.1E. In cases where the allocation amount is less than the proposer's requested amount, grantees should work with the Regional Office to reduce scope or scale the project such that a complete phase or project is accomplished. Grantees are reminded that program requirements such as cost sharing or local match can be found in the NOFA. A discretionary project identification number has been assigned to each project for tracking purposes and must be used in the TrAMs application. Selected projects are eligible for pre-award authority no earlier than April 14, 2016. Pre-award authority is also contingent upon other requirements, such as planning and environmental requirements, having been met. For more about FTA's policy on pre-award authority, please see the FTA Fiscal Year 2016 Apportionments, Allocations, and Program Information and Interim Guidance found in 81 *FR* 7893 (February 16, 2016). Post-award reporting requirements include submission of the Federal Financial Report and Milestone progress reports in TrAMs. The grantees must comply with all applicable Federal statutes, regulations, executive orders, FTA circulars, and other Federal requirements in carrying out the project supported by the FTA grant. FTA emphasizes that grantees must follow all third-party procurement guidance, as described in FTA.C.4220.1F Third Party Contracting Guidance. Funds allocated in this announcement must be obligated in a grant by September 30, 2021.

Carolyn Flowers,

Acting Administrator.

[FR Doc. 2016–12143 Filed 5–20–16; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Sanctions Actions Pursuant to Executive Order 13448, Executive Order 13310, and Executive Order 13464

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the name of six entities whose property and interests in property are blocked pursuant to Executive Order (E.O.) 13448 of October 18, 2007, "Blocking Property and Prohibiting Certain Transactions Related to Burma" (E.O. 13448) and the Burmese Sanctions Regulations, 31 CFR part 537 (BSR). OFAC is also removing ten entities whose property and interests in property have been unblocked pursuant to Executive Order 13310 of July 28, 2003, "Blocking Property of the Government of Burma and Prohibiting Certain Transactions" (E.O. 13310) or Executive Order 13464 of April 30, 2008, "Blocking Property and Prohibiting Certain Transactions Related to Burma" (E.O. 13464) and the BSR.

DATES: The actions described in this notice were effective on May 17, 2016.

FOR FURTHER INFORMATION CONTACT: The Department of the Treasury's Office of Foreign Assets Control: Assistant Director for Licensing, tel.: 202–622–2480, Assistant Director for Regulatory Affairs, tel.: 202–622–4855, Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490; or the Department of the Treasury's Office of the Chief Counsel (Foreign Assets Control), Office of the General Counsel, tel.: 202–622–2410.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site (*www.treasury.gov/ofac*). Certain general information pertaining to OFAC's sanctions programs is available via facsimile through a 24-hour fax-on-demand service, tel.: 202/622–0077.

Notice of OFAC Action

On May 17, 2016, OFAC identified six entities in which Steven Law or Asia World Co. Ltd., persons whose property and interests in property are blocked pursuant to E.O. 13448 and the BSR, own a 50 percent or greater interest, and added their names to OFAC's list of Specially Designated Nationals and Blocked Persons (SDN List):

Entities

1. SHWE NAR WAH COMPANY LIMITED, No. 39/40, Bogyoke Aung San Road, Bahosi Housing, Lanmadaw, Rangoon, Burma; Registration ID 1922/2007–2008 (Burma) [BURMA] (Linked to: LAW, Steven).

2. GREEN ASIA SERVICES CO., LTD., No. 61/62, Bahosi Housing, War Tan St., Lanmadaw T/S, Rangoon, Burma; Registration ID 4013/2011–2012 (Burma) [BURMA] (Linked to: ASIA WORLD CO. LTD.)

3. GLOBAL WORLD INSURANCE COMPANY LIMITED, No. 44, Thein Phyu Road, Corner of Bogyoke Aung San Road and Thein Phyu Road, Pazuntaung, Rangoon, Burma; Registration ID 2511/2012–2013 (Burma) [BURMA] (Linked to: ASIA WORLD CO. LTD.)

4. ASIA MEGA LINK CO., LTD., No. 39/40, Bogyoke Aung San Road, Bahosi Housing, Lanmadaw, Rangoon, Burma; Registration ID 1679/2009–2010 (Burma) [BURMA] (Linked to: ASIA WORLD CO. LTD.)

5. ASIA MEGA LINK SERVICES CO., LTD., No. 44/45, Bogyoke Aung San Road, Bahosi Housing Complex, Lanmadaw, Rangoon, Burma; Registration ID 2652/2010–2011 (Burma) [BURMA] (Linked to ASIA WORLD CO. LTD.)

6. PIONEER AERODROME SERVICES CO., LTD., No. 203/204, Thiri Mingalar Housing, Strand Rd, Ahlone, Rangoon, Burma; Registration ID 620/2007–2008 (Burma) [BURMA] (Linked to: ASIA WORLD CO. LTD.)

On May 17, 2016, OFAC, in consultation with the Department of State, determined that circumstances no longer warrant the inclusion of the following entities in the Annex to E.O. 13310, and on OFAC's SDN List, and that these entities are no longer subject to the blocking provisions of Section 1(a) of E.O. 13310:

Entities

1. MYANMA FOREIGN TRADE BANK (a.k.a. MYANMAR FOREIGN TRADE BANK), P.O. Box 203, 80–86 Maha Bandoola Garden Street, Kyauktada T/S, Yangon, Burma; SWIFT/BIC FOTMMMM1 [BURMA]

2. MYANMA INVESTMENT AND COMMERCIAL BANK (a.k.a. MICB; a.k.a. MYANMAR INVESTMENT AND COMMERCIAL BANK), 170/176 Bo Aung Kyaw Street, Botataung Township, Yangon, Burma; SWIFT/BIC MYANMMM1; SWIFT/BIC MICB MM MY; SWIFT/BIC MICB MM MY MAN [BURMA]

3. MYANMA ECONOMIC BANK (a.k.a. MYANMAR ECONOMIC BANK), 1–19 Sule Pagoda Road, Pabedan T/S, Yangon, Burma [BURMA]

On May 17, 2016, OFAC, in consultation with the Department of State, determined that circumstances no longer warrant the blocking of the property and interests in property of, or the prohibiting of transactions with, the following entities in the Annex to E.O. 13464, and on OFAC's SDN List, and that these entities are no longer subject to the blocking provisions of Section 1(a) of E.O. 13464:

Entities

1. MYANMAR TIMBER ENTERPRISE (a.k.a. MTE; a.k.a. MYANMA TIMBER ENTERPRISE), P.O. Box 206, Mission Road/Ahlone Street, Rangoon, Burma [BURMA]

2. MYANMAR GEM ENTERPRISE (a.k.a. MGE; a.k.a. MYANMA GEM ENTERPRISE), 66 Kaba Aye Pagoda Road, Rangoon, Mayangone Township (MYGN), Burma [BURMA]

3. MYANMAR PEARL ENTERPRISE (a.k.a. MPE; a.k.a. MYANMA PEARL ENTERPRISE), No. 4345, Bu Khwe, Naypyitaw, Burma [BURMA]

On May 17, 2016, OFAC, in consultation with the Department of State, determined that circumstances no longer warrant the inclusion of the following entities on the SDN List and that these entities are no longer subject to the blocking provisions of Section 1(b) of E.O. 13464:

Entities

1. CO-OPERATIVE EXPORT-IMPORT ENTERPRISE (a.k.a. CEIE), 259/263 Bogyoke Aung San Street, Yangon, Burma [BURMA]
2. NO. 1 MINING ENTERPRISE, 90 Kanbe Road, Yankin, Rangoon, Burma [BURMA]
3. NO. 2 MINING ENTERPRISE, 90 Kanbe Road, Yankin, Rangoon, Burma [BURMA]
4. NO. 3 MINING ENTERPRISE, 90 Kanbe Road, Yankin, Rangoon, Burma [BURMA]

Dated: May 17, 2016.

John E. Smith,

Acting Director, Office of Foreign Assets Control.

[FR Doc. 2016–12011 Filed 5–20–16; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning TD 8995, Mid-Contract Change in Taxpayer.

DATES: Written comments should be received on or before July 22, 2016 to be assured of consideration.

ADDRESSES: Direct all written comments to Tuawana Pinkston, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this regulation should be directed to Martha R. Brinson, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *Martha.R.Brinson@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Mid-Contract Change in Taxpayer.

OMB Number: 1545–1732.

Regulation Project Number: TD 8995.

Abstract: The information is needed by taxpayers who assume the obligation to account for the income from long-term contracts as the result of certain nontaxable transactions.

Current Actions: There is no change in the paperwork burden previously approved by OMB.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 5,000.

Estimated Time per Respondent: 2 hrs.

Estimated Total Annual Reporting Burden Hours: 10,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: May 12, 2016.

Tuawana Pinkston,

IRS Reports Clearance Officer.

[FR Doc. 2016–12132 Filed 5–20–16; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Revenue Procedure 2001–21

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Revenue Procedure 2001–21, Debt Roll-Ups.

DATES: Written comments should be received on or before July 22, 2016 to be assured of consideration.

ADDRESSES: Direct all written comments to Tuawana Pinkston, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to Allan Hopkins at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the internet at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Debt Roll-Ups.

OMB Number: 1545–1647.

Revenue Procedure Number: Revenue Procedure 2001–21.

Abstract: Revenue Procedure 2001–21 provides for an election that will facilitate the consolidation of two or more outstanding debt instruments into a single debt instrument. Under the election, taxpayers can treat certain exchanges of debt instruments as realization events for federal income tax purposes even though the exchanges do not result in significant medications under section 1.1001–3 of the Income Tax Regulations.

Current Actions: There are no changes to the paperwork burden relating to this revenue procedure at this time.

Type of Review: Reinstatement of a previously approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 100.

Estimated Time per Respondent: 45 minutes.

Estimated Total Annual Burden Hours: 75.

The following paragraph applies to all the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: May 13, 2016.

Allan Hopkins,

Tax Analyst.

[FR Doc. 2016–12131 Filed 5–20–16; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–NEW]

Proposed Information Collection (Notice of Disagreement (NOD) (Pension, Dependency and Indemnity Compensation (DIC), Burial and Accrued), VA Form 21P–0970); Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed new collection of information and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before July 22, 2016.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420 or email to *nancy.kessinger@va.gov.* Please refer to "OMB Control No. 2900–NEW, VA Form 21P–0970" in any correspondence. During the comment period, comments may be viewed online through the FDMS.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 632–8924 or FAX (202) 632–8925.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–21), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Notice of Disagreement (NOD) (Pension, Dependency and Indemnity Compensation (DIC), Burial and Accrued), VA Form 21P–0970.

OMB Control Number: 2900–NEW.

Type of Review: New Collection (Request for a new OMB Control Number).

Abstract: The Department of Veterans Affairs (VA), through its Veterans Benefits Administration (VBA), administers an integrated program of benefits and services, established by law, for Veterans, service personnel, and their dependents and/or beneficiaries. Information is requested by this form under the authority of 38 U.S.C. 7105. The statute is codified at 38 CFR 20.201, 20.302, and 20.501.

The statute and regulations describe the process by which a claimant can appeal the decisions made by VBA on a claim for benefits.

VA Form 21P–0970 will be used by the claimant to initiate an appeal by indicating disagreement with a decision issued by a VA Regional Office (RO) specifically related to a claim for VA pension benefits, dependency and indemnity compensation (DIC) benefits, burial benefits, and accrued benefits. VA Form 21P–0970 will be the claimant's first step in the appeal process. The respondent may or may not continue with an appeal to the Board of Veterans Appeals (BVA). If the claimant opts to continue to BVA for an appeal, this form will be included in the claim folder as evidence.

VA will provide VA Form 21P–0970 to the claimant with the notification letter of the decision in paper form or via hyperlink to VA's Web site. The use of VA Form 21P–0970 will be mandatory when claimants initiate an appeal of a decision on a pension, DIC, burial, or accrued claims for benefits.

Currently, VBA does not have a mandatory form which would enable the claimant to initiate an appeal of a decision made regarding entitlement to pension, DIC, burial, or accrued benefits. As a result, claimants may provide their notice of disagreement in any format. The variety of submissions hampers efforts to identify, and process timely, the claimant's appeal. With the implementation of this collection, the submissions will be standardized, increasing efficiency.

Affected Public: Individuals or households.

Estimated Annual Burden: 6,000 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 12,000.

By direction of the Secretary.

Kathleen M. Manwell,

Program Analyst, VA Privacy Service, Office of Privacy and Records Management, Department of Veterans Affairs.

[FR Doc. 2016–12033 Filed 5–20–16; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0161]

Proposed Information Collection (Medical Expense Report, VA Form 21P–8416) Activity: Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of a currently approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before July 22, 2016.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420 or email to *nancy.kessinger@va.gov.* Please refer to “OMB Control No. 2900–0161” in any correspondence. During the comment period, comments may be viewed online through the FDMS.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 632–8924 or FAX (202) 632–8925.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–21), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Medical Expense Report, VA Form 21P–0161.

OMB Control Number: 2900–0161.

Type of Review: Revision of a Currently Approved Collection.

Abstract: The Department of Veterans Affairs (VA), through its Veterans Benefits Administration (VBA), administers an integrated program of benefits and services established by law for veterans, service personnel, and their dependents and/or beneficiaries. Information is requested by this form under the authority of 38 U.S.C. 1503(a)(8) regarding exceptions to countable income for needs-based benefits, specifically an amount equal to amounts paid by a claimant or beneficiary for unreimbursed medical expenses.

VA Form 21P–8416 is used by claimants and beneficiaries to report unreimbursed medical expenses for the purpose of reducing their countable income associated with needs-based benefit programs such as VA Pension and Parents' Dependency and Indemnity Compensation (DIC). Unreimbursed medical expenses are deducted from otherwise countable income to determine eligibility for income-based benefits and the rate payable.

Affected Public: Individuals or households.

Estimated Annual Burden: 48,200 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 96,400.

By direction of the Secretary.

Kathleen M. Manwell,

Program Analyst, VA Privacy Service, Office of Privacy and Records Management, Department of Veterans Affairs.

[FR Doc. 2016–12032 Filed 5–20–16; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0797]

Proposed Information Collection (Principles of Excellence Complaint System Intake); Activity: Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before July 22, 2016.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420 or email to *nancy.kessinger@va.gov.* Please refer to “OMB Control No. 2900–0797” in any correspondence. During the comment period, comments may be viewed online through the FDMS.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 632–8924 or FAX (202) 632–8925.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–21), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Principles of Excellence Complaint System Intake.

OMB Control Number: 2900–0797.

Type of Review: Extension of an approved collection.

Abstract: Executive Order 13607, Establishing Principles of Excellence for Educational Institutions Serving Service Members, Veterans, Spouses, and Other Family Members, requires the establishment of a centralized complaint system for students receiving Federal military and veteran educational benefits. The purpose of the complaint system is to provide a standardized method to submit a complaint against an educational institution alleging fraudulent and unduly aggressive recruiting techniques, misrepresentation, payment of incentive compensation, failure to meet state authorization requirements, or failure to adhere to the Principles of Excellence as outlined in the Executive Order.

Affected Public: Individuals or households.

Estimated Annual Burden: 375 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 1,500.

By direction of the Secretary.

Kathleen M. Manwell,

Program Analyst, VA Privacy Service, Office of Privacy and Records Management, Department of Veterans Affairs.

[FR Doc. 2016–12031 Filed 5–20–16; 8:45 am]

BILLING CODE 8320–01–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
1985

FEDERAL REGISTER

Vol. 81 Monday,
No. 99 May 23, 2016

Part II

Department of Labor

Wage and Hour Division

29 CFR Part 541

Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Announcement of Time-Limited Non-Enforcement Policy for Providers of Medicaid-Funded Services for Individuals With Intellectual or Developmental Disabilities in Residential Homes and Facilities With 15 or Fewer Beds and Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rules

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 541

Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Announcement of Time-Limited Non-Enforcement Policy for Providers of Medicaid-Funded Services for Individuals With Intellectual or Developmental Disabilities in Residential Homes and Facilities With 15 or Fewer Beds

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Announcement of policy.

SUMMARY: The Department of Labor's (Department or DOL) Final Rule revising the regulations for implementing the exemption from minimum wage and overtime pay for executive, administrative, professional, outside sales, and computer employees, published in the Rules section of today's **Federal Register**, will become effective December 1, 2016. This document announces a time-limited non-enforcement policy for providers of Medicaid-funded services for individuals with intellectual or developmental disabilities in residential homes and facilities with 15 or fewer beds. From December 1, 2016 to March 17, 2019, the Department will not enforce the updated salary threshold of $913 per week for the subset of employers covered by this non-enforcement policy. Throughout the duration of this non-enforcement policy, the Department will engage in outreach and technical assistance efforts, including to providers of services in settings covered by this policy. This non-enforcement policy does not apply to providers of Medicaid- funded services for individuals with intellectual or developmental disabilities in residential care facilities with 16 or more beds.

DATES: May 23, 2016.

FOR FURTHER INFORMATION CONTACT: Director, Division of Regulations, Legislation and Interpretation, U.S. Department of Labor, Wage and Hour Division, Room S–3502, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693–0406 (this is not a toll-free number). Copies of this docuemnt may be obtained in alternative formats (Large Print, Braille, Audio Tape or Disc), upon request, by calling (202) 693–0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1–877–889–5627 to obtain information or request materials in alternative formats.

SUPPLEMENTARY INFORMATION:

I. Non-Enforcement Policy

Today, the Department's Wage and Hour Division issued *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees;* Final Rule ("Overtime Final Rule" or "Final Rule"). This Final Rule revised the regulations under the FLSA implementing the exemption from minimum wage and overtime pay for executive, administrative, professional, outside sales, and computer employees. These exemptions are frequently referred to as the "white collar" exemptions and are contained in 29 CFR part 541. To be considered exempt under Part 541, employees must meet certain minimum requirements related to their primary job duties and, in most instances, must be paid on a salary basis at not less than the minimum amounts specified in the regulations. Among other changes, the Final Rule updated the salary level above which certain white collar workers may be exempt from overtime pay requirements from the previous level of $455 per week (the equivalent of $23,660 per year) to a new level of $913 per week (the equivalent of $47,476 per year). The Department set an effective date of December 1, 2016 for the Final Rule, explaining that this will provide employers sufficient time—more than 180 days—to make any changes that are necessary to comply with the final regulations.

The Department and the U.S. Department of Health and Human Services ("HHS") have engaged in appropriate interagency discussions regarding the interaction between the Overtime Final Rule and HHS' policy and regulatory priorities. During these communications HHS expressed particular concerns about the Final Rule's impact on residential homes and facilities for individuals with intellectual or developmental disabilities with 15 or fewer beds. HHS also voiced concern that the December 1, 2016 effective date could affect the federal government's efforts to encourage the use of such community-based providers, and stated that providing this subset of Medicaid-funded providers additional time to implement these requirements could help mitigate potential budgeting and implementation concerns for these providers.

HHS conveyed that the Final Rule coincides with implementation of certain provisions of its rule affecting states' provision of Medicaid home and community-based services ("HCBS"). *See* 79 FR 2948 (Jan. 16, 2014). Among its provisions, this HHS rule requires that all settings for HCBS be integrated in and support the beneficiary's full access to the greater community and requires States and the provider infrastructure on which these services rely to implement necessary enhancements to their Medicaid home and community based systems to comply with these new requirements. States have until March 17, 2019 to implement approved transition plans under which providers must be in full compliance with the rule, and HHS expressed concern that the timing of the Overtime Final Rule could undermine compliance efforts of HCBS providers.

The Department is committed to working with HHS to ensure that implementation of the Overtime Final Rule does not compromise its agency priorities or regulations. Based on these discussions with HHS, the Department has determined that DOL enforcement of the new salary threshold in the Overtime Final Rule in the period immediately following the December 1, 2016 effective date could have an impact on the use of these types of community-based facilities. Providing this subset of providers of Medicaid-funded services additional time to transition and seek technical assistance from the Department without being subject to DOL enforcement of the new salary threshold may mitigate some potential budgeting and implementation concerns.

Providers in this subset of Medicaid-funded residential homes and facilities face a unique combination of challenges in balancing the goal of shifting care of individuals with intellectual or developmental disabilities to small community-based settings and meeting the timeline for implementing the HHS rule impacting HCBS providers, with the fact that these facilities are small, dependent on Medicaid funding in state budgets, and serve vulnerable populations. The non-enforcement policy will allow the Department to devote its time and resources to providing assistance to these providers of services at small community-based facilities, and will allow these employers time, if needed, to work with their state legislatures and HHS on implementation of the Overtime Final Rule.

Accordingly, after carefully considering appropriate interagency discussions with HHS, the Department has decided to enact a time-limited non-enforcement policy for providers of Medicaid-funded services for individuals with intellectual or developmental disabilities in residential homes and facilities with 15 or fewer beds. This non-enforcement period will last from December 1, 2016 (the effective date of the Overtime Final Rule) until March 17, 2019. During this period of non-enforcement, the Department will not enforce the updated salary threshold of $913 per week for the subset of employers covered by this non-enforcement policy. However, the Department will continue to enforce all other provisions of the Overtime Final Rule as to this subset of employers, including in instances involving employees who meet the salary basis and duties tests but who earn less than the previous salary threshold of $455 per week. The non-enforcement policy does not apply to providers of Medicaid- funded services for individuals with intellectual or developmental disabilities in residential care facilities with 16 or more beds.

Regulatory Requirements

This document is non-binding guidance articulating considerations relevant to the Department's exercise of its enforcement authority under the FLSA. It is therefore exempt from the notice-and-comment rulemaking requirements under the Administrative Procedure Act pursuant to 5 U.S.C. 553(b).

Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis. 5 U.S.C. 603(a), 604(a). The Department has determined that this guidance does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring OMB approval under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

Authority: 29 U.S.C. 216(c); Secretary's Order No. 01–2014.

Mary Ziegler,

Assistant Administrator for Policy, Wage and Hour Division.

[FR Doc. 2016–11753 Filed 5–18–16; 8:45 am]

BILLING CODE 4510–27–P

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 541

RIN 1235–AA11

Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Final rule.

SUMMARY: The Fair Labor Standards Act (FLSA or Act) guarantees a minimum wage for all hours worked during the workweek and overtime premium pay of not less than one and one-half times the employee's regular rate of pay for hours worked over 40 in a workweek. While these protections extend to most workers, the FLSA does provide a number of exemptions. In this Final Rule, the Department of Labor (Department) revises final regulations under the FLSA implementing the exemption from minimum wage and overtime pay for executive, administrative, professional, outside sales, and computer employees. These exemptions are frequently referred to as the "EAP" or "white collar" exemptions. To be considered exempt under part 541, employees must meet certain minimum requirements related to their primary job duties and, in most instances, must be paid on a salary basis at not less than the minimum amounts specified in the regulations.

In this Final Rule the Department updates the standard salary level and total annual compensation requirements to more effectively distinguish between overtime-eligible white collar employees and those who may be exempt, thereby making the exemption easier for employers and employees to understand and ensuring that the FLSA's intended overtime protections are fully implemented. The Department sets the standard salary level for exempt EAP employees at the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region. The Department also permits employers to satisfy up to 10 percent of the standard salary requirement with nondiscretionary bonuses, incentive payments, and commissions, provided these forms of compensation are paid at least quarterly. The Department sets the total annual compensation requirement for an exempt Highly Compensated Employee (HCE) equal to the annualized weekly earnings of the 90th percentile of full-time salaried workers nationally. The Department also adds a provision to the regulations that automatically updates the standard salary level and HCE compensation requirements every three years by maintaining the earnings percentiles set in this Final Rule to prevent these thresholds from becoming outdated. Finally, the Department has not made any changes in this Final Rule to the duties tests for the EAP exemption.

DATES: This Final Rule is effective on December 1, 2016.

FOR FURTHER INFORMATION CONTACT: Director, Division of Regulations, Legislation and Interpretation, U.S. Department of Labor, Wage and Hour Division, Room S–3502, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693–0406 (this is not a toll-free number). Copies of this Final Rule may be obtained in alternative formats (Large Print, Braille, Audio Tape or Disc), upon request, by calling (202) 693–0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1–877–889–5627 to obtain information or request materials in alternative formats.

Questions of interpretation and/or enforcement of the agency's regulations may be directed to the nearest Wage and Hour Division (WHD) district office. Locate the nearest office by calling the WHD's toll-free help line at (866) 4US–WAGE ((866) 487–9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto WHD's Web site at *http://www.dol.gov/whd/america2.htm* for a nationwide listing of WHD district and area offices.

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I. Executive Summary

The Fair Labor Standards Act (FLSA or Act) guarantees a minimum wage for all hours worked and limits to 40 hours per week the number of hours an employee can work without additional compensation. Section 13(a)(1) of the FLSA, which was included in the original Act in 1938, exempts from these minimum wage and overtime pay protections "any employee employed in a bona fide executive, administrative, or professional capacity." The exemption is premised on the belief that these kinds of workers typically earn salaries well above the minimum wage and enjoy other privileges, including above-average fringe benefits, greater job security, and better opportunities for advancement, setting them apart from workers entitled to overtime pay. The statute delegates to the Secretary of Labor the authority to define and delimit the terms of the exemption.

The Department has undertaken this rulemaking in order to revise the regulations so that they effectively distinguish between overtime-eligible white collar employees who Congress intended to be protected by the FLSA's minimum wage and overtime provisions and bona fide EAP employees whom it intended to exempt. When the definition becomes outdated, employees who Congress intended to protect receive neither the higher salaries and above-average benefits expected for EAP employees nor do they receive overtime pay, and employers do not have an efficient means of identifying workers who are, and are not, entitled to the FLSA's protections. With this Final Rule, the Department will ensure that white collar employees who should receive extra pay for overtime hours will do so and that the test for exemption remains up-to-date so future workers will not be denied the protections that Congress intended to afford them.

In 1938, the Department issued the first regulations at 29 CFR part 541 defining the scope of the section 13(a)(1) white collar exemption. Since 1940, the regulations implementing the exemption have generally required each of three tests to be met for the exemption to apply: (1) The employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the "salary basis test"); (2) the amount of salary paid must meet a minimum specified amount (the "salary level test"); and (3) the employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (the "duties test"). While payment of a salary does not make an employee ineligible for overtime compensation, the Department has nonetheless long recognized the salary level test is the best single test of exempt status for white collar employees. The salary level test is an objective measure that helps distinguish white collar employees who are entitled to overtime from those who may be bona fide executive, administrative, or professional (EAP) employees. If left at the same amount over time, however, the effectiveness of the salary level test as a means of determining exempt status diminishes as the wages of employees increase and the real value of the salary threshold falls.

The Department has updated the salary level requirements seven times since 1938, most recently in 2004 when the salary level an employee must be paid to come within the standard test for EAP exemption was set at $455 per week ($23,660 per year for a full-year worker), which nearly tripled the $155 per week minimum salary level required for exemption up to that point. The Department also modified the duties tests in 2004, eliminating the "long" and "short" tests that had been part of the regulations since 1949 and replacing them with the "standard" test. The historic long test paired a lower salary requirement with a stringent duties test including a 20 percent cap on the amount of time most exempt employees could spend on nonexempt duties, while the short test paired a higher salary requirement with a less stringent duties test. In other words, prior to the 2004 Final Rule, to exempt lower-paid employees from receiving overtime the employer would have to meet more rigorous requirements; but for higher-paid employees, the requirements to establish the applicability of the exemption were less rigorous. The standard test established by the Department in the 2004 Final Rule paired a duties test closely based on the less-stringent short duties test with a salary level derived from the lower long test salary level. This had the effect of making it easier for employers to both pay employees a lower salary and not pay them overtime for time worked beyond 40 hours. The 2004 Final Rule also created an exemption for highly compensated employees (HCE), which imposes a very minimal duties test but requires that an employee must earn at least $100,000 in total annual compensation.

On March 13, 2014, President Obama signed a Presidential Memorandum directing the Department to update the regulations defining which white collar workers are protected by the FLSA's minimum wage and overtime standards. 79 FR 18737 (Apr. 3, 2014). The memorandum instructed the Department to look for ways to modernize and simplify the regulations while ensuring that the FLSA's intended overtime protections are fully implemented. The Department published a proposal to update the part 541 regulations on July 6, 2015.

One of the Department's primary goals in this rulemaking is updating the standard salary requirement, both in light of the passage of time since 2004, and because the Department has concluded that the effect of the 2004 Final Rule's pairing of a standard duties test based on the less rigorous short duties test with the kind of low salary level previously associated with the more rigorous long duties test was to exempt from overtime many lower paid workers who performed little EAP work and whose work was otherwise indistinguishable from their overtime-eligible colleagues. This has resulted in the inappropriate classification of employees as EAP exempt—that is overtime exempt—who pass the standard duties test but would have failed the long duties test. As the Department noted in our proposal, the salary level's function in helping to differentiate overtime-eligible employees from employees who may be exempt takes on greater importance when the duties test does not include a specific limit on the amount of nonexempt works that an exempt employee may perform.

In the Notice of Proposed Rulemaking (NPRM), the Department proposed setting the standard salary level at the 40th percentile of weekly earnings of full-time salaried workers nationally and setting the HCE total annual compensation requirement at the annualized value of the 90th percentile of weekly earnings of full-time salaried workers nationally. The Department further proposed to automatically update these levels annually to ensure that they would continue to provide an effective test for exemption. In the NPRM, the Department also asked for the public's comments on whether nondiscretionary bonuses or incentive payments should count toward some portion of the required salary level. Finally, the Department also discussed concerns with the standard duties tests and sought comments on a series of questions regarding possible changes to the tests.

After considering the comments, the Department has made several changes from the proposed rule to the Final Rule. In particular, the Department has modified the standard salary level to more fully account for the lower salaries paid in certain regions. In this Final Rule, the Department sets the standard salary level equal to the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region (currently the South). This results in a salary level of $913 per week, or $47,476 annually for a full-year worker, based on data from the fourth quarter of 2015.[1] The Department believes that a standard salary level set at the 40th percentile of full-time salaried employees in the lowest-wage Census Region will accomplish the goal of setting a salary threshold that adequately distinguishes between employees who may meet the duties requirements of the EAP exemption and those who likely do not, without necessitating the reintroduction of a limit on nonexempt work, as existed under the long duties test. The Department sets the HCE total annual compensation level equal to the 90th percentile of earnings of full-time salaried workers nationally ($134,004 annually based on the fourth quarter of 2015), as we proposed. This increase will bring the annual compensation requirement in line with the level established in 2004. The Department believes that this will avoid the unintended exemption of large numbers of employees in high-wage areas—such as secretaries in New York City or Los Angeles—who are clearly not performing EAP duties.

In order to prevent the salary and compensation levels from becoming outdated, the Department is including in the regulations a mechanism to automatically update the salary and compensation thresholds by maintaining the fixed percentiles of weekly earnings set in this Final Rule. In response to comments, however, the Final Rule provides for updates every three years rather than for annual updates as proposed. The first update will take effect on January 1, 2020. The Department believes that regularly updating the salary and compensation levels is the best method to ensure that these tests continue to provide an effective means of distinguishing between overtime-eligible white collar employees and those who may be bona fide EAP employees. Based on historical wage growth in the South, at the time of the first update on January 1, 2020, the standard salary level is likely to be approximately $984 per week ($51,168 annually for a full-year worker) and the HCE total annual compensation requirement is likely to be approximately $147,524.

The Department also revises the regulations to permit employers for the first time to count nondiscretionary bonuses, incentives, and commissions toward up to 10 percent of the required salary level for the standard exemption, so long as employers pay those amounts on a quarterly or more frequent basis. Finally, the Department has not made any changes to the duties tests in this Final Rule. The majority of the revisions occur in §§ 541.600, 541.601, 541.602 and new § 541.607; conforming changes were also made in §§ 541.100, 541.200, 541.204, 541.300, 541.400, 541.604, 541.605, and 541.709.

In FY2017,[2] the Department estimates there will be approximately 159.9 million wage and salary workers in the United States, of whom we estimate that 22.5 million will be exempt EAP workers potentially affected by this Final Rule.[3] In Year 1, FY2017, the Department estimates that 4.2 million currently exempt workers who earn at least the current weekly salary level of $455 but less than the 40th earnings percentile in the South ($913) would, without some intervening action by their employers, become entitled to minimum wage and overtime protection under the FLSA (Table ES1). Similarly, an estimated 65,000 currently exempt workers who earn at least $100,000 but less than the annualized earnings of the 90th percentile of full-time salaried workers nationally ($134,004), and who meet the HCE duties test but not the standard duties test, may also become eligible for minimum wage and overtime protection. In Year 10, with triennial automatic updating of the salary and compensation levels, the Department projects that 5.0 million workers will be affected by the change in the standard salary level test and 221,000 workers will be affected by the change in the HCE total annual compensation test.

Additionally, the Department estimates that another 5.7 million white collar workers who are currently overtime eligible because they do not satisfy the EAP duties tests and who currently earn at least $455 per week but less than $913 per week will have their overtime protection strengthened in Year 1 because their status as overtime-eligible will be clear based on the salary test alone without the need to examine their duties. Reducing the number of workers for whom employers must apply the duties test to determine exempt status simplifies the application of the exemption and is consistent with the President's directive.

The Department quantified three direct costs to employers in this Final Rule: (1) Regulatory familiarization costs; (2) adjustment costs; and (3) managerial costs. Assuming a 7 percent discount rate, the Department estimates that average annualized direct employer costs will total $295.1 million per year (Table ES1). In addition to the direct costs, this Final Rule will also transfer income from employers to employees in the form of higher earnings. We estimate average annualized transfers to be $1,189.1 million. The Department also projects average annualized deadweight loss of $9.2 million, and notes that the projected deadweight loss is small in comparison to the amount of estimated costs.

The change to a standard salary level based on the lowest-wage Census Region has decreased the salary amount from the proposal, resulting in a smaller number of affected workers and lower transfers than estimated in the NPRM. Direct costs are higher than predicted in the NPRM, primarily because the Department has increased its estimate of the number of affected workers who work some overtime. Additionally, in response to comments, the Department has increased estimated regulatory familiarization and adjustment costs in the Final Rule.

Finally, the impacts of the Final Rule extend beyond those we have estimated quantitatively. The Department discusses other transfers, costs, and benefits in the relevant sections.

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[1] The Bureau of Labor Statistics (BLS) estimated this value using Current Population Survey (CPS) data for earnings of full-time (defined as at least 35 hours per week) non-hourly paid employees. For the purpose of this rulemaking, the Department considers data representing compensation paid to non-hourly workers to be an appropriate proxy for compensation paid to salaried workers.

[2] Affected workers, costs, and transfers were estimated for the 2017 fiscal year ("FY2017") because this will be the first year the updated salary levels will be in effect. FY2017 spans from October 1, 2016 to September 30, 2017.

[3] White collar workers not subject to the EAP salary level test include teachers, academic administrative personnel, physicians, lawyers, judges, and outside sales workers.

TABLE ES1—SUMMARY OF REGULATORY COSTS AND TRANSFERS, STANDARD AND HCE SALARY LEVELS

[Millions 2017$]

Impact	Year 1	Future years [a]		Average annualized value	
		Year 2	Year 10	3% real rate	7% real rate
Affected Workers (1,000s)					
Standard	4,163	3,893	5,045		
HCE	65	73	217		
Total	4,228	3,965	5,261		
Costs and Transfers (Millions 2017$) [b]					
Direct employer costs	677.9	208.0	284.2	288.0	295.1
Transfers [c]	1,285.2	936.5	1,607.2	1,201.6	1,189.1
DWL	6.4	8.7	11.1	9.3	9.2

[a] Costs/transfers in years 3 through 9 are within the range bounded by the estimates for years 2 and 10.
[b] Costs and transfers for affected workers passing the standard and HCE tests are combined.
[c] This is the net transfer from employers to workers. There may also be transfers of hours and income from some workers to others.

II. Background

A. What the FLSA Provides

The FLSA generally requires covered employers to pay their employees at least the federal minimum wage (currently $7.25 an hour) for all hours worked, and overtime premium pay of one and one-half times the employee's regular rate of pay for all hours worked over 40 in a workweek.[4] However, there are a number of exemptions from the FLSA's minimum wage and overtime requirements. Section 13(a)(1) of the FLSA, codified at 29 U.S.C. 213(a)(1), exempts from both minimum wage and overtime protection "any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of [the Administrative Procedure Act] . . .)." The FLSA does not define the terms "executive," "administrative," "professional," or "outside salesman." Pursuant to Congress' grant of rulemaking authority, the Department in 1938 issued the first regulations at part 541 defining the scope of the section 13(a)(1) exemptions. Because Congress explicitly delegated to the Secretary of Labor the power to define and delimit the specific terms of the exemptions through notice and comment rulemaking, regulations so issued have the binding effect of law. *See Batterton* v. *Francis,* 432 U.S. 416, 425 n.9 (1977).

The Department has consistently used our rulemaking authority to define and clarify the section 13(a)(1) exemptions. Since 1940, the implementing regulations have generally required each of three tests to be met for the exemptions to apply: (1) The employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the "salary basis test"); (2) the amount of salary paid must meet a minimum specified amount (the "salary level test"); and (3) the employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (the "duties test").

Employees who meet the requirements of part 541 are exempted from both the Act's minimum wage and overtime pay protections. As a result, an employer may employ such employees for any number of hours in the workweek without paying the minimum hourly wage or an overtime premium. Some state laws have stricter exemption standards than those described above. The FLSA does not preempt any such stricter state standards. If a State establishes a higher standard than the provisions of the FLSA, the higher standard applies in that State. *See* 29 U.S.C. 218.

B. Legislative History

Section 13(a)(1) was included in the original Act in 1938 and was based on provisions contained in the earlier National Industrial Recovery Act of 1933 (NIRA) and state law precedents. Specific references in the legislative history to the exemptions contained in section 13(a)(1) are scant. Although section 13(a)(1) exempts covered employees from both the FLSA's minimum wage and overtime requirements, its most significant impact is its removal of these employees from the Act's overtime protections.

The requirement that employers pay a premium rate of pay for all hours worked over 40 in a workweek is grounded in two policy objectives. The first is to spread employment (or, in other words, reduce involuntary unemployment) by incentivizing employers to hire more employees rather than requiring existing employees to work longer hours. *See, e.g., Davis* v. *J.P. Morgan Chase,* 587 F.3d 529, 535 (2d Cir. 2009). The second policy objective is to reduce overwork and its detrimental effect on the health and well-being of workers. *See, e.g., Barrentine* v. *Arkansas-Best Freight System, Inc.,* 450 U.S. 728, 739 (1981).

In contrast, the exemptions contained in section 13(a)(1) were premised on the belief that the type of work exempt employees performed was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week, making enforcement of the overtime provisions difficult and generally precluding the potential job expansion intended by the FLSA's time-and-a-half overtime premium. *See* Report of the Minimum Wage Study Commission, Volume IV, pp. 236 and 240 (June 1981).[5] Further, the exempted workers typically earned salaries well above the minimum wage and were presumed to enjoy other privileges to compensate them for their long hours of work, setting them apart from the nonexempt workers entitled to overtime pay. *See id.*

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[4] As discussed below, the Department estimates that 132.8 million workers are subject to the FLSA and the Department's regulations. Most of these workers are covered by the Act's minimum wage and overtime pay protections.

[5] Congress created the Minimum Wage Study Commission as part of the Fair Labor Standards Amendments of 1977. *See* Sec. 2(e)(1), Public Law

The universe of employees eligible for the section 13(a)(1) exemptions has fluctuated with amendments to the FLSA. Initially, persons employed in a "local retailing capacity" were exempt, but Congress eliminated that language from section 13(a)(1) in 1961 when the FLSA was expanded to cover retail and service enterprises. *See* Public Law 87–30, 75 Stat. 65 (May 5, 1961). Teachers and academic administrative personnel were added to the exemption when elementary and secondary schools were made subject to the FLSA in 1966. *See* Sec. 214, Public Law 89–601, 80 Stat. 830 (Sept. 23, 1966). The Education Amendments of 1972 made the Equal Pay provisions, section 6(d) of the FLSA, expressly applicable to employees who were otherwise exempt from the FLSA under section 13(a)(1). *See* Sec. 906(b)(1), Public Law 92–318, 86 Stat. 235 (June 23, 1972).

A 1990 enactment expanded the EAP exemptions to include computer systems analysts, computer programmers, software engineers, and similarly skilled professional workers, including those paid on an hourly basis if paid at least 6½ times the minimum wage. *See* Sec. 2, Public Law 101–583, 104 Stat. 2871 (Nov. 15, 1990). The compensation test for computer-related occupations was subsequently capped at $27.63 an hour (6½ times the minimum wage in effect at the time) as part of the 1996 FLSA Amendments, when Congress enacted the new section 13(a)(17) exemption for such computer employees. Section 13(a)(17) also incorporated much of the regulatory language that resulted from the 1990 enactment. *See* 29 U.S.C. 213(a)(17), as added by the 1996 FLSA Amendments (Sec. 2105(a), Public Law 104–188, 110 Stat. 1755 (Aug. 20, 1996)).

C. Regulatory History

The FLSA became law on June 25, 1938, and the Department issued the first version of the part 541 regulations, setting forth criteria for exempt status under section 13(a)(1), that October. 3 FR 2518 (Oct. 20, 1938). Following a series of public hearings, which were discussed in a report issued by WHD,[6] the Department published revised regulations in 1940, which, among other things, added the salary basis test. 5 FR 4077 (Oct. 15, 1940). Further hearings were convened in 1947, as discussed in a WHD-issued report,[7] and the Department issued revised regulations in 1949, which updated the salary levels required to meet the salary level test for the various exemptions. 14 FR 7705 (Dec. 24, 1949). An explanatory bulletin interpreting some of the terms used in the regulations was published as subpart B of part 541 in 1949. 14 FR 7730 (Dec. 28, 1949). In 1954, the Department issued revisions to the regulatory interpretations of the salary basis test. 19 FR 4405 (July 17, 1954). In 1958, based on another WHD-issued report,[8] the regulations were revised to update the required salary levels. 23 FR 8962 (Nov. 18, 1958). Additional changes, including salary level updates, were made to the regulations in 1961 (26 FR 8635, Sept. 15, 1961), 1963 (28 FR 9505, Aug. 30, 1963), 1967 (32 FR 7823, May 30, 1967), 1970 (35 FR 883, Jan. 22, 1970), 1973 (38 FR 11390, May 7, 1973), and 1975 (40 FR 7091, Feb. 19, 1975). Revisions to increase the salary levels in 1981 were stayed indefinitely by the Department. 46 FR 11972 (Feb. 12, 1981). In 1985, the Department published an Advance Notice of Proposed Rulemaking that reopened the comment period on the 1981 proposal and broadened the review to all aspects of the regulations, including whether to increase the salary levels, but this rulemaking was never finalized. 50 FR 47696 (Nov. 19, 1985).

The Department revised the part 541 regulations twice in 1992. First, the Department created a limited exception from the salary basis test for public employees, permitting public employers to follow public sector pay and leave systems requiring partial-day deductions from pay for absences for personal reasons or due to illness or injury not covered by accrued paid leave, or due to budget-driven furloughs, without defeating the salary basis test required for exemption. 57 FR 37677 (Aug. 19, 1992). The Department also implemented the 1990 law requiring it to promulgate regulations permitting employees in certain computer-related occupations to qualify as exempt under section 13(a)(1) of the FLSA. 57 FR 46744 (Oct. 9, 1992); *see* Sec. 2, Public Law 101–583, 104 Stat. 2871 (Nov. 15, 1990).

On March 31, 2003, the Department published a Notice of Proposed Rulemaking proposing significant changes to the part 541 regulations. 68 FR 15560 (Mar. 31, 2003). On April 23, 2004, the Department issued a Final Rule (2004 Final Rule), which raised the salary level for the first time since 1975, and made other changes, some of which are discussed below. 69 FR 22122 (Apr. 23, 2004). Current regulations retain the three tests for exempt status that have been in effect since 1940: a salary basis test, a salary level test, and a job duties test.

D. Overview of Existing Regulatory Requirements

The regulations in part 541 contain specific criteria that define each category of exemption provided by section 13(a)(1) for bona fide executive, administrative, and professional employees (including teachers and academic administrative personnel), and outside sales employees. The regulations also define those computer employees who are exempt under section 13(a)(1) and section 13(a)(17). *See* §§ 541.400–.402. The employer bears the burden of establishing the applicability of any exemption from the FLSA's pay requirements. Job titles and job descriptions do not determine exempt status, nor does paying a salary rather than an hourly rate. To qualify for the EAP exemption, employees must meet certain tests regarding their job duties and generally must be paid on a salary basis of not less than $455 per week.[9] In order for the exemption to

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95–151, 91 Stat. 1246 (Nov. 1, 1977). This independent commission was tasked with examining many FLSA issues, including the Act's minimum wage and overtime exemptions, and issuing a report to the President and to Congress with the results of its study.

[6] Executive, Administrative, Professional . . . Outside Salesman Redefined, Wage and Hour Division, U.S. Department of Labor, Report and Recommendations of the Presiding Officer (Harold Stein) at Hearings Preliminary to Redefinition (Oct. 10, 1940) ("Stein Report").

[7] Report and Recommendations on Proposed Revisions of Regulations, Part 541, by Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (June 30, 1949) ("Weiss Report").

[8] Report and Recommendations on Proposed Revision of Regulations, Part 541, Under the Fair Labor Standards Act, by Harry S. Kantor, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (Mar. 3, 1958) ("Kantor Report").

[9] Alternatively, administrative and professional employees may be paid on a "fee basis." This occurs where an employee is paid an agreed sum for a single job regardless of the time required for its completion. *See* § 541.605(a). Salary level test compliance for fee basis employees is assessed by determining whether the hourly rate for work performed (*i.e.*, the fee payment divided by the number of hours worked) would total at least $455 per week if the employee worked 40 hours. *See* § 541.605(b). Some employees, such as doctors and lawyers (§ 541.600(e)), teachers (§§ 541.303(d); 541.600(e)), and outside sales employees (§ 541.500(c)), are not subject to a salary or fee basis test. Some, such as academic administrative personnel, are subject to a special, contingent salary level. *See* § 541.600(c). There is also a separate salary level in effect for workers in American Samoa (§ 541.600(a)), and a special salary test for motion picture industry employees (§ 541.709).

apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations. The duties tests differ for each category of exemption.

The Department last updated the part 541 regulations in the 2004 Final Rule. Prior to 2004, employers could assert the EAP exemption for employees who satisfied either a "long" test—which paired a more restrictive duties test with a lower salary level—or a "short" test—which paired less stringent duties requirements with a higher salary level.[10] In the 2004 Final Rule the Department abandoned the concept of separate long and short tests, opting instead for one "standard" test, and set the salary level under the new standard duties test at $455 per week for executive, administrative, and professional employees.

Under the current part 541 regulations, an exempt executive employee must be compensated on a salary basis at a rate of not less than $455 per week and have a primary duty of managing the enterprise or a department or subdivision of the enterprise. *See* § 541.100(a)(1)–(2). An exempt executive must also customarily and regularly direct the work of at least two employees and have the authority to hire or fire, or the employee's suggestions and recommendations as to the hiring, firing, or other change of status of employees must be given particular weight. *See* § 541.100(a)(3)–(4).

An exempt administrative employee must be compensated on a salary or fee basis at a rate of not less than $455 per week and have a primary duty of the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers. *See* § 541.200. An exempt administrative employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. *See id.*

An exempt professional employee must be compensated on a salary or fee basis at a rate of not less than $455 per week and have a primary duty of (1) work requiring knowledge of an advanced type in a field of science or learning customarily acquired by prolonged, specialized, intellectual instruction and study, or (2) work that is original and creative in a recognized field of artistic endeavor, or (3) teaching in a school system or educational institution, or (4) work as a computer systems analyst, computer programmer, software engineer, or other similarly-skilled worker in the computer field. *See* §§ 541.300; 541.303; 541.400. An exempt professional employee must perform work requiring the consistent exercise of discretion and judgment, or requiring invention, imagination, or talent in a recognized field of artistic endeavor. *See* § 541.300(a)(2). The salary requirements do not apply to certain licensed or certified doctors, lawyers, and teachers. *See* §§ 541.303(d); 541.304(d).

An exempt outside salesperson must be customarily and regularly engaged away from the employer's place of business and have a primary duty of making sales, or obtaining orders or contracts for services or for the use of facilities. *See* § 541.500. There are no salary or fee requirements for exempt outside sales employees. *See id.*

The 2004 Final Rule also created a test for exemption of highly compensated executive, administrative, and professional employees. Under the HCE exemption, employees who are paid total annual compensation of at least $100,000 (which must include at least $455 per week paid on a salary or fee basis) are exempt from the FLSA's overtime requirements if they customarily and regularly perform at least one of the exempt duties or responsibilities of an executive, administrative, or professional employee identified in the standard tests for exemption. *See* § 541.601. The HCE exemption applies only to employees whose primary duty includes performing office or non-manual work; non-management production line workers and employees who perform work involving repetitive operations with their hands, physical skill, and energy are not exempt under this section no matter how highly paid. *See id.* Finally, in the 2004 Final Rule, the Department, mindful that nearly 30 years had elapsed between salary level increases, and in response to commenter concerns that similar lapses would occur in the future, expressed an intent to "update the salary levels on a more regular basis." 69 FR 22171.

E. Presidential Memorandum

On March 13, 2014, President Obama signed a Presidential Memorandum directing the Department to update the regulations defining which "white collar" workers are protected by the FLSA's minimum wage and overtime standards. *See* 79 FR 18737 (Apr. 3, 2014). The memorandum instructed the Department to look for ways to modernize and simplify the regulations while ensuring that the FLSA's intended overtime protections are fully implemented. As the President noted at the time, the FLSA's overtime protections are a linchpin of the middle class, and the failure to keep the salary level requirement for the white collar exemption up to date has left millions of low-paid salaried workers without this basic protection.[11] The current salary level threshold for exemption of $455 per week, or $23,660 annually, is below the 2015 poverty threshold for a family of four.[12]

Following issuance of the memorandum, the Department embarked on an extensive outreach program, meeting with over 200 organizations in Washington, DC and several other locations, as well as by conference call. A wide range of stakeholders attended the listening sessions: employees, employers, business associations, non-profit organizations, employee advocates, unions, state and local government representatives, tribal representatives, and small businesses. In these sessions the Department asked stakeholders to address, among other issues: (1) What is the appropriate salary level for exemption; (2) what, if any, changes should be made to the duties tests; and (3) how can the regulations be simplified.

The stakeholders shared their concerns with various aspects of the current regulations, suggestions for changes, and general concerns about the scope of the exemption. The Department greatly appreciated the wide range of views that were shared during the outreach sessions. The information shared during those sessions informed the Department's NPRM.

The Department's outreach also made clear, however, that there are some widespread misconceptions about overtime eligibility under the FLSA, some of which were echoed in the comments received on the NPRM. For example, many employers and employees mistakenly believe that payment of a salary automatically disqualifies an employee from entitlement to overtime compensation irrespective of the duties performed. Many employees are also unaware of the duties required to be performed in order for the exemption to apply. Additionally, many employers seem to mistakenly believe that newly overtime-eligible employees (*i.e.*, those earning between the current and new salary levels) *must* be converted to hourly compensation.[13] Similarly, some employers erroneously believe that they are prohibited from paying nondiscretionary bonuses to EAP employees, given that they cannot be used to satisfy the salary requirement. Some employers also mistakenly believe that the EAP regulations limit their ability to permit white collar employees to work part-time or job share.[14]

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[10] From 1949 until 2004 the regulations contained both long and short tests for exemption.

[11] *See http://www.whitehouse.gov/the-press-office/2014/03/13/fact-sheet-opportunity-all-rewarding-hard-work-strengthening-overtime-pr.*

[12] *See http://www.census.gov/hhes/www/poverty/data/threshld/index.html (the 2015 poverty threshold for a family of four with two related children).* The 2015 poverty threshold for a family of four with two related people under 18 in the household is $24,036.

F. The Department's Proposal

On July 6, 2015, in accordance with the Presidential Memorandum, the Department published a Notice of Proposed Rulemaking to propose revisions to the part 541 regulations. *See* 80 FR 38516 (July 6, 2015). The Department's proposal focused primarily on updating the salary and HCE compensation levels by proposing that the standard salary level be set at the 40th percentile of weekly earnings of full-time salaried workers, proposing to increase the HCE annual compensation requirement to the annualized value of the 90th percentile of weekly earnings of full-time salaried workers, and proposing a mechanism for automatically updating the salary and compensation levels going forward to ensure that they will continue to provide a useful and effective test for exemption. While the primary regulatory changes proposed were in §§ 541.600 and 541.601, the Department proposed additional conforming changes to update references to the salary level throughout part 541 as well as to update the special salary provisions for American Samoa and the motion picture industry. In addition to these proposed changes, the Department also discussed whether to include nondiscretionary bonuses in determining whether the standard salary level is met and whether changes to the duties tests are warranted, but did not propose specific regulatory revisions on these issues.

More than 270,000 individuals and organizations timely commented on the NPRM during the sixty-day comment period that ended on September 4, 2015. The Department received comments from a broad array of constituencies, including small business owners, Fortune 500 corporations, employer and industry associations, individual workers, worker advocacy groups, unions, non-profit organizations, law firms (representing both employers and employees), educational organizations and representatives, religious organizations, economists, Members of Congress, federal government agencies, state and local governments and representatives, tribal governments and representatives, professional associations, and other interested members of the public. All timely received comments may be viewed on the *www.regulations.gov* Web site, docket ID WHD–2015–0001.

Several organizations' submissions included attachments from their individual members generally using substantively identical form comments: For example, AFSCME (24,122 comments), Center for American Progress (6,697 comments from two submissions), CREDO Action (58,927 comments), Democracy for America (34,932 comments), Economic Policy Institute (72,131 comments from five submissions), Faculty Forward and SEIU (515 comments), Jobs with Justice (5,136 comments), Mom's Rising (16,114 comments from three submissions), National Partnership for Women and Families (21,192 comments from two submissions), National Restaurant Association (2,648 comments), National Women's Law Center (6,753 comments from two submissions), Partnership to Protect Workplace Opportunity (1,770 comments from five submissions), Social Security Works (15,575 comments), Society for Human Resource Management (827 comments from two submissions), and others. Other organizations attached membership signatures to their comments. These included Care2 (37,459 signatures), the International Franchise Association (17 signatures), Organizing for Action (76,625 signatures), and 15 different post-doctoral associations (560 signatures).

Many of the comments the Department received were: (1) Very general statements of support or opposition; (2) personal anecdotes that did not address a specific aspect of the proposed changes; or (3) identical or nearly identical "campaign" comments sent in response to comment initiatives sponsored by various groups. A large number of commenters favored some change to the existing regulations, and commenters expressed a wide variety of views on the merits of particular aspects of the Department's proposal. Some commenters requested that the Department withdraw the proposal. Acknowledging that there are strong views on the issues presented in this rulemaking, the Department has carefully considered the timely submitted comments addressing the proposed changes.

Significant issues raised in the timely received comments are discussed below, together with the Department's response to those comments and a topical discussion of the changes that have been made in the Final Rule and its regulatory text. The Department also received a number of submissions after the close of the comment period, including some campaign comments, from a range of commenters representing both employers and employees. Late comments were not considered in the development of this Final Rule, and are not discussed in this Final Rule. In instances where an organization submitted both timely and untimely comments, only the timely comments were considered.

The Department received a number of comments that are beyond the scope of this rulemaking. These include, for example, comments asking the Department to issue a rule requiring employers to provide employees with "clear pay stubs," and requesting that the Department clarify the definition of "establishment" under the exemption for seasonal amusement or recreational establishments. The Department does not address such issues in this Final Rule.

A number of commenters asked the Department to provide guidance on how the FLSA applies to non-profit organizations. *See, e.g.*, Alliance for Strong Families and Communities (describing "a tremendous amount of confusion in the non-profit sector concerning who is currently covered by FLSA"); Independent Sector (stating that this rulemaking process has "highlighted a lack of clarity regarding when and how the Fair Labor Standards Act applies to the nonprofit sector workforce"); Alliance of Arizona Nonprofits. Some commenters, such as CASA, asserted that most charitable organizations are not covered enterprises under the FLSA and, as a result, this rulemaking "will not reach a very sizable number of employees of not-for-profit organizations." Other commenters stated that non-profit employees may be individually covered because they engage in interstate commerce. A comment submitted on behalf of 57 professors specializing in employment and labor law, however, asserted that the "overwhelming majority of the millions of employees excluded from FLSA coverage because their not-for-profit employers are not subject to enterprise coverage also are not subject to individual FLSA coverage," and Economic Policy Institute (EPI) asserted that non-profit employers can limit the number of employees covered on an individual basis by managing interstate commerce activity.

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[13] Such misconceptions are not new. In 1949 the Department noted "the failure of some employers to realize that salary is not the sole test of exemption." Weiss Report at 8 n. 27. In 1940 the Department responded to the assertion that employers would convert overtime-eligible white collar employees to hourly pay instead of more secure salaries, stating: "Without underestimating the general desirability of weekly or monthly salaries which enable employees to adjust their expenditures on the basis of an assured income (so long as they remain employed), there is little advantage in salaried employment if it serves merely as a cloak for long hours of work. Further, such salaried employment may well conceal excessively low hourly rates of pay." Stein Report at 7.

[14] As the Department has previously explained, there is no special salary level for EAP employees working less than full-time. *See* 69 FR 22171. Employers, however, can pay white collar employees working part-time or job sharing a salary of less than the required EAP salary threshold and will not violate the Act so long as the salary equals at least the minimum wage for all hours worked and the employee does not work more than 40 hours a week. *See* FLSA2008–1NA (Feb. 14, 2008). *See also* section IV.A.iv.

The Department notes that the FLSA does not provide special rules for non-profit organizations or their employees, nor does this Final Rule. Nevertheless, we agree that it is important for such organizations to understand their obligations under the Act. As a general matter, non-profit charitable organizations are not covered enterprises under the FLSA unless they engage in ordinary commercial activities (for example, operating a gift shop). *See* 29 U.S.C. 203(r)–(s), 206(a), 207(a). For a non-profit organization, enterprise coverage applies only to the activities performed for a business purpose; it does not extend to the organization's charitable activities. An organization that performs only charitable services, such as providing free food to the hungry, is not a covered enterprise; however, an employee of such a non-profit employer may nevertheless be covered on an individual basis. *See* 29 U.S.C. 206(a), 207(a). The FLSA covers an employee on an individual basis—that is, an individual is protected by the FLSA regardless of whether the individual works for a covered enterprise—if he or she engages in interstate commerce through activities such as making out-of-state phone calls, sending mail, or handling credit card transactions. This individual coverage applies even if the employee is not engaging in such activities for a business purpose. For example, if an employee regularly calls an out-of-state store and uses a credit card to purchase food for a non-profit that provides free meals for the homeless, that employee is protected by the FLSA on an individual basis, even though the non-profit may not be covered as an enterprise. WHD, however, will not assert that an employee who on isolated occasions spends an insubstantial amount of time performing such work is individually covered by the FLSA.

The Department also refers interested stakeholders to guidance on the application of the FLSA to non-profit organizations available in WHD Fact Sheet #14A: Non-Profit Organizations and the Fair Labor Standards Act;[15] *see also* Fact Sheet #14: Coverage Under the Fair Labor Standards Act (FLSA).[16] Additional information regarding the applicability of the FLSA to non-profits can be found in the WHD Administrator's blog post.[17] Moreover, a number of WHD Opinion Letters address the applicability of the FLSA to non-profits. *See, e.g.,* FLSA2009–20 (Jan. 16, 2009); FLSA2008–8 (Sept. 29, 2008); FLSA2005–52 (Nov. 14, 2005); FLSA2005–8NA (Sept. 2, 2005); FLSA2005–12NA (Sept. 23, 2005); FLSA2004–29NA (Nov. 30, 2004).[18] Finally, the Department is issuing additional guidance for the non-profit sector in connection with the publication of this Final Rule.

Commenters also asked for guidance on the application of the EAP exemption to educational institutions. *See, e.g.,* College and Universities Human Resources Executives; Michigan Head Start; Savannah-Chatham County Public School System. Preschools, elementary and secondary schools, and institutions of higher education are covered by the FLSA, and nothing in this Final Rule changes that coverage. 29 U.S.C. 203(r)(2)(A). Employees of such institutions therefore are generally protected by the FLSA's minimum wage and overtime provisions; however, special provisions apply to many personnel at these institutions that make them overtime exempt.

Although the EAP exemption expressly applies to an "employee employed in the capacity of academic administrative personnel or teacher" 29 U.S.C. 213(a)(1); *see* §§ 541.204, .303, the salary level and salary basis requirements *do not* apply to bona fide teachers. § 541.303(d), .600(e). Accordingly, the increase in the standard salary level in this Final Rule will not affect the overtime eligibility of bona fide teachers.

Commenters such as the NEA asked the Department to clarify which workers qualify as bona fide teachers. Teachers are exempt if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment. § 541.303(a). An educational establishment is "an elementary or secondary school system, an institution of higher education or other educational institution."[19] § 541.204(b). Teachers may include professors, adjunct instructors, primary and secondary school teachers, and teachers of skilled and semi-skilled trades and occupations. Preschool and kindergarten teachers may also qualify for exemption under the same conditions as teachers in elementary and secondary schools. *See* Fact Sheet #46: Daycare Centers and Preschools Under the Fair Labor Standards Act. In addition, coaches may qualify for the exemption if their primary duty is teaching as opposed to recruiting students to play sports or performing manual labor. Some commenters addressed other non-teaching staff. For example, CUPA–HR commented about workers including academic affairs counselors and advisors, textbook managers, and managers in food service, security, and building and grounds, among other employees working at colleges and universities. Academic administrative personnel subject to the exemption include: Superintendents; principals and vice-principals; department heads in institutions of higher education; academic counselors and advisors; and other employees with similar responsibilities. Academic administrative employees are subject to the salary basis requirement, but the Department notes that a special provision allows this requirement to be met if such employees are paid "on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment by which [they are] employed." § 541.204(a)(1). To the extent that this entrance salary is below the salary level established in this rule, academic administrative personnel will be exempt if their salary equals or exceeds the entrance salary. Employees whose work relates to general business operations, building management and maintenance, or the health of students and staff (such as lunch room managers), do not perform academic administrative functions. § 541.204(c).

The Department also received several comments about postdoctoral scholars.

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[15] Available at: *http://www.dol.gov/whd/regs/compliance/whdfs14a.pdf.*

[16] Available at: *http://www.dol.gov/whd/regs/compliance/whdfs14.pdf.*

[17] Available at: *http://blog.dol.gov/2015/08/26/non-profits-and-the-proposed-overtime-rule/.*

[18] Available at: *http://www.dol.gov/whd/opinion/flsa.htm; http://www.dol.gov/whd/opinion/flsana.htm.*

[19] For purposes of the exemption, no distinction is drawn between public and private schools, or between those operated for profit and those that are not for profit. § 541.204(b).

See, e.g., Association of American Medical Colleges; National Postdoctoral Association; UAW Local 5810. Postdoctoral scholars who do not have a primary duty of teaching are not considered bona fide teachers; these employees would generally meet the duties test for the learned professional exemption and would be subject to the salary basis and salary level tests.

Finally, the Council on Government Relations commented that "it is our understanding that the Wage and Hour Division does not assert an employee-employer relationship for graduate students who are simultaneously performing research under faculty supervision." The Department views graduate students in a graduate school engaged in research under the supervision of a member of the faculty and in the course of obtaining advanced degrees as being in an educational relationship and not in an employment relationship with either the school or of any grantor funding the research, even though the student may receive a stipend for performing the research. 1994 WL 1004845 (June 28, 1994). In an effort to assist the educational sector with the issues addressed above, the Department is issuing additional guidance for this sector in connection with the publication of this Final Rule.

Lastly, in an attempt to address concerns that the terms exempt and nonexempt were not sufficiently descriptive or intuitive, in the NPRM the Department used the terms "overtime-protected" and "overtime-eligible" as synonyms for nonexempt, and "not overtime-protected" and "overtime-ineligible" as synonyms for exempt.[20] The Department received very few comments on this new terminology. The Department believes that these new terms are less confusing to the public and continues to use them in this Final Rule.

G. Effective Date

The Department received a number of comments concerning the effective date of the Final Rule. Citing the need to reduce the burden of implementation, many commenters representing employers requested a delayed effective date following publication of the Final Rule. Commenters including the Fisher & Phillips law firm, the National Association of Independent Schools and the National Association of Business Officers, requested an effective date at least 120 days after publication as was done in the Department's 2004 rulemaking.

Other commenters requested a longer period. The American Car Rental Association (ACRA), Dollar Tree, and the Retail Industry Leaders Association (RILA) each requested a delayed effective date of at least six months following publication of the Final Rule. The United States Chamber of Commerce (Chamber), the Food Marketing Institute (FMI), H–E–B, Island Hospitality Management, the National Association of Landscape Professionals (NALP), the National Council of Chain Restaurants (NCCR), the National Retail Federation (NRF), and the Securities Industry and Financial Markets Association (SIFMA) each requested a one-year delayed effective date. Finally, Laff and Associates, the National Association for Home Care and Hospice, and American Network of Community Options and Resources (ANCOR), which coordinated with more than three dozen home health care organizations, submitted comments requesting an effective date at least two years following publication of the Final Rule, to afford states sufficient time to allocate and appropriate funding.

More than 55,000 individuals submitted comments coordinated by the Center for American Progress, EPI, and MomsRising, requesting that the salary level be raised without delay. Many labor organizations and social justice and women's advocacy organizations, including the Center for Law and Social Policy, the Center for Popular Democracy, the First Shift Justice Project, the Institute for Women's Policy Research (IWPR), the Leadership Conference on Civil and Human Rights, the National Education Association (NEA), the National Coalition of Classified Education Support Employees Union, the National Urban League, the Public Justice Center, the United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Women Employed, and others, similarly urged the Department to implement the Final Rule as soon as possible.

The Department has set an effective date of December 1, 2016 for the Final Rule. As several commenters noted, the Department's 2004 Final Rule set an effective date 120 days following publication of the final rule. *See* 79 FR 22126 (April 23, 2004). Explaining that a 120-day effective date exceeds the 30-day minimum required under the Administrative Procedure Act (APA), 5 U.S.C. 553(d), and the 60 days mandated for a "major rule" under the Congressional Review Act, 5 U.S.C. 801(a)(3)(A), we concluded at that time that "a period of 120 days after the date of publication will provide employers ample time to ensure compliance with the final regulations." *Id.* The changes provided in the 2004 Final Rule were more extensive and more complicated for employers to implement—the 2004 Final Rule included several significant changes: (1) A significant percentage increase in the salary threshold; (2) a significant reorganization of the part 541 regulations; (3) the elimination of the short and long test structure that had been in place for more than 50 years and the creation of a single standard test; and (4) the creation of a new test for highly compensated employees. In light of the Department's decision not to make changes to the standard duties test at this time, the primary change in this Final Rule is the revision to the salary level test and, therefore, this rule will be much less complicated for employers to implement. Accordingly, the Department believes that the December 1, 2016 effective date for this Final Rule (more than 180 days after publication) will provide ample time for employers to ensure compliance.

Multiple commenters also requested a delayed enforcement period or some form of safe harbor following the effective date of the Final Rule ranging from six months to two years. *See, e.g.,* ACRA; American Insurance Association and the Property Casualty Insurers Association of America (AIA–PCI); AT&T; Chamber; Dollar Tree; International Franchise Association (IFA); the Littler Mendelson law firm; RILA; the Wessels Sherman law firm; World Travel. Several commenters also asked the Department to provide compliance assistance, whether related specifically to the changes implemented by the Final Rule or more broadly to the FLSA's white collar regulations in general. *See, e.g.,* Chamber; Dollar Tree; IFA; Littler Mendelson; RILA.

The Department appreciates employer concerns regarding compliance and enforcement in light of this rulemaking. As explained above, the Department believes that the December 1, 2016 effective date will provide employers ample time to make any changes that are necessary to comply with the final regulations. The Department will also provide significant outreach and compliance assistance, and will issue a number of guidance documents in connection with the publication of this Final Rule.

III. Need for Rulemaking

One of the Department's primary goals in this rulemaking is updating the section 13(a)(1) exemption's standard salary level requirement. A salary level test has been part of the regulations since 1938 and has been long recognized as "the best single test" of exempt status. Stein Report at 19, 42; *see* Weiss Report at 8–9; Kantor Report at 2–3. The salary an employer pays an employee provides "a valuable and easily applied index to the 'bona fide' character of the employment for which exemption is claimed" and ensures that section 13(a)(1) of the FLSA "will not invite evasion of section 6 [minimum wage] and section 7 [overtime] for large numbers of workers to whom the wage-and-hour provisions should apply." Stein Report at 19.

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[20] The Department is using the more precise term "overtime exempt" rather than "overtime-ineligible" in this Final Rule.

The salary level's function in differentiating exempt from overtime-eligible employees takes on greater importance when there is only one duties test that has no limitation on the amount of nonexempt work that an exempt employee may perform, as has been the case since 2004. Historically, the Department set two different salary tests that were paired with different duties tests. The long test salary level set at the low end of salaries paid to exempt employees imposed a cap on the amount of nonexempt work that an exempt employee could perform. This aspect of the long duties test made it effective in distinguishing lower-paid exempt EAP employees from overtime-eligible employees. In effect, the long duties test ensured that employers could not avoid paying overtime by assigning lower-paid employees a minimal amount of exempt work. The short test salary level, which was historically set at a level between 130 and 180 percent of the long test salary level, did not impose any specific limit on the amount of nonexempt work since that distinction was not considered necessary to aid in classifying higher-paid exempt EAP employees. In eliminating the two salary tests in 2004, the Department instead set the single standard salary level equivalent to the historic levels of the former long test salary, but paired it with a standard duties test based on the short duties test, which did not include a limit on nonexempt work. The effect of this mismatch was to exempt from overtime many lower-wage workers who performed little EAP work and whose work was otherwise indistinguishable from their overtime-eligible colleagues.

The Department has now concluded that the standard salary level we set in 2004 did not account for the absence of the more rigorous long duties test and thus has been less effective in distinguishing between EAP employees who are exempt from overtime and overtime-eligible employees. Additionally, the salary level required for exemption under section 13(a)(1) is currently $455 a week and has not been updated in more than 10 years. The annual value of the salary level ($23,660) is now lower than the poverty threshold for a family of four. As the relationship between the current standard salary level and the poverty threshold shows, the effectiveness of the salary level test as a means of helping determine exempt status diminishes as the wages of employees entitled to overtime pay increase and the real value of the salary threshold falls.

By way of this rulemaking, the Department seeks to update the standard salary level to ensure that it works effectively with the standard duties test to distinguish exempt EAP employees from overtime-protected white collar workers. This will make the exemptions easier for employers and workers to understand and ensure that the FLSA's intended overtime protections are fully implemented. The Department also proposed to update the total annual compensation required for the HCE exemption, because it too has been unchanged since 2004 and must be updated to avoid the unintended exemption of employees in high-wage areas who are clearly not performing EAP duties.

In a further effort to respond to changing conditions in the workplace, the Department's proposal also requested comment on whether to allow nondiscretionary bonuses and incentive payments to satisfy some portion of the standard test salary requirement. Currently, such bonuses are only included in calculating total annual compensation under the HCE test, but some stakeholders have urged broader inclusion, pointing out that in some industries significant portions of salaried EAP employees' earnings may be in the form of such bonuses.

The Department also proposed automatically updating the salary and compensation levels to prevent the levels from becoming outdated. The Department proposed to automatically update the standard salary test, the total annual compensation requirement for highly compensated employees, and the special salary levels for American Samoa and for motion picture industry employees, in order to ensure the continued utility of these tests over time. As the Department explained in 1949, the salary test is only a strong measure of exempt status if it is up to date, and a weakness of the salary test is that increases in wage rates and salary levels over time gradually diminish its effectiveness. *See* Weiss Report at 8. A rule providing for automatic updates to the salary level using a consistent methodology that has been subject to notice and comment rulemaking will maintain the utility of the dividing line set by the salary level without the need for frequent rulemaking. This modernization of the regulations will provide predictability for employers and employees by replacing infrequent, and thus more drastic, salary level increases with gradual changes occurring at set intervals.

Finally, the Department has always recognized that the salary level test works in tandem with the duties tests to identify bona fide EAP employees. The Department discussed concerns with the duties test for executive employees in the NPRM. The proposal also included questions about the duties tests including requiring exempt employees to spend a specified amount of time performing their primary duty (*e.g.*, a 50 percent primary duty requirement as required under California state law) or otherwise limiting the amount of nonexempt work an exempt employee may perform, and adding to the regulations additional examples illustrating how the exemption may apply to particular occupations. The Department's proposal sought feedback on whether such revisions to the duties tests are needed to ensure that these tests fully reflect the purpose of the exemption.

IV. Final Regulatory Revisions

A. Standard Salary Level

i. History of the Standard Salary Level

The FLSA became law on June 25, 1938, and the first version of part 541, issued later that year, set a minimum salary level of $30 per week for exempt executive and administrative employees. *See* 3 FR 2518. Since 1938, the Department has increased the salary levels seven times: in 1940, 1949, 1958, 1963, 1970, 1975, and 2004. *See* Table A. While the Department has refined the method for calculating the salary level to fulfill its mandate, the purpose of the salary level requirement has remained consistent—to define and delimit the scope of the executive, administrative, and professional exemptions. *See* 29 U.S.C. 213(a)(1). The Department has long recognized that the salary paid to an employee is the "best single test" of exempt status, Stein Report at 19, and that the salary level test furnishes a "completely objective and precise measure which is not subject to differences of opinion or variations in judgment." Weiss Report at 8–9. The Department reaffirmed this position in the 2004 Final Rule, explaining that the "salary level test is intended to help distinguish bona fide executive, administrative, and professional employees from those who were not intended by Congress to come within these exempt categories," and reiterating that any increase in the salary level must "have as its primary objective the drawing of a line separating exempt from nonexempt employees." 69 FR 22165.

TABLE A—WEEKLY SALARY LEVELS FOR EXEMPTION

Date enacted	Long test			Short test (all)
	Executive	Administrative	Professional	
1938	$30	$30	....	....
1940	30	50	$50	....
1949	55	75	75	$100
1958	80	95	95	125
1963	100	100	115	150
1970	125	125	140	200
1975	155	155	170	250
Standard Test				
2004	$455			

In 1940, the Department maintained the $30 per week salary level set in 1938 for executive employees, increased the salary level for administrative employees, and established a salary level for professional employees. The Department used salary surveys from federal and state government agencies, experience gained under the National Industrial Recovery Act, and federal government salaries to determine the salary level that was the "dividing line" between employees performing exempt and nonexempt work. *See* Stein Report at 9, 20–21, 31–32. The Department recognized that the salary level falls within a continuum of salaries that overlaps the outer boundaries of exempt and nonexempt employees. Specifically, the Department stated:

> To make enforcement possible and to provide for equity in competition, a rate should be selected in each of the three definitions which will be reasonable in the light of average conditions for industry as a whole. In some instances the rate selected will inevitably deny exemption to a few employees who might not unreasonably be exempted, but, conversely, in other instances it will undoubtedly permit the exemption of some persons who should properly be entitled to the benefits of the act.

Id. at 6. Taking into account the average salary levels for employees in numerous industries, and the percentage of employees earning below these amounts, the Department set the salary level for each exemption slightly below the "dividing line" suggested by these averages.

In 1949, the Department again looked at salary data from state and federal agencies, including the Bureau of Labor Statistics (BLS). The data reviewed included wages in small towns and low-wage industries, earnings of federal employees, average weekly earnings for exempt employees, starting salaries for college graduates, and salary ranges for different occupations such as bookkeepers, accountants, chemists, and mining engineers. *See* Weiss Report at 10, 14–17, 19–20. The Department noted that the "salary level adopted must exclude the great bulk of nonexempt persons if it is to be effective." *Id.* at 18. Recognizing that the "increase in wage rates and salary levels" since 1940 had "gradually weakened the effectiveness of the present salary tests as a dividing line between exempt and nonexempt employees," the Department calculated the percentage increase in weekly earnings from 1940 to 1949, and then adopted new salary levels "at a figure slightly lower than might be indicated by the data" in order to protect small businesses. *Id.* at 8, 14. The Department also cautioned that "a dividing line cannot be drawn with great precision but can at best be only approximate." *Id.* at 11.

Also in 1949, the Department established a second, less-stringent duties test for each exemption, but only for those employees paid at or above a higher "short test" salary level. Those paid above the higher salary level were exempt if they also met a "short" duties test, which lessened the duties requirements for exemption.[21] The original, more thorough duties test became known as the "long" test, and remained for more than 50 years the test employers were required to satisfy for those employees whose salary was insufficient to meet the higher short test salary level. Apart from the differing salary requirements, the most significant difference between the short test and the long test was the long test's limit on the amount of time an exempt employee could spend on nonexempt duties while allowing the employer to claim the exemption. A bright-line, 20 percent cap on nonexempt work was instituted as part of the long duties test in 1940 for executive and professional employees, and in 1949 for administrative employees.[22] The short duties tests did not include a specific limit on nonexempt work.[23] The rationale for the less rigorous short duties test was that employees who met the higher salary level were more likely to meet "all the requirements for exemption . . . including the requirement with respect to nonexempt work." *Id.* at 22–23. Thus, a "short-cut test for exemption . . . would facilitate the administration of the regulations without defeating the purposes of section 13(a)(1)." *Id.*

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[21] These higher salary levels are presented under the "Short Test" heading in Table A.

[22] By statute, beginning in 1961, retail employees could spend up to 40 percent of their hours worked performing nonexempt work and still be found to meet the duties tests for the EAP exemption. *See* 29 U.S.C. 213(a)(1).

[23] For example, the long duties test in effect from 1949 to 2004 for administrative employees required that an exempt employee: (1) Have a primary duty consisting of the performance of office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers; (2) customarily and regularly exercise discretion and independent judgment; (3) regularly and directly assist a proprietor or a bona fide executive or administrative employee, or perform under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or execute under only general supervision special assignments and tasks; and (4) not devote more than 20 percent (or 40 percent in a retail or service establishment) of hours worked in the workweek to activities that are not directly and closely related to the performance of the work described above. *See* § 541.2 (2003). By contrast, the short duties test in effect during the 1949 to 2004 period provided that an administrative employee paid at or above the short test salary level qualified for exemption if the employee's primary duty consisted of the performance of office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers which includes work requiring the exercise of discretion and independent judgment. *See id.*

In contrast to the Department's extensive discussion of the methodology for setting the long test salary level, the Department's rulemakings have included comparatively little discussion of the methodology for setting the short test levels. While the Department set the long test salary level based on an analysis of the defined sample, we set the short test salary level in relation to the long test salary, and the initial short test salary set in 1949 was 133 percent of the highest long test salary (administrative and professional). In 1958, the Department rejected the suggestion that the short test salary level should be increased by the same dollar amount that the highest long test salary levels were increased and instead increased the short test salary to maintain the "percentage differential in relation to the highest [long test] salary requirement." *See* Kantor Report at 10. In 1970, the Department adopted a "slightly higher percentage differential" between the "basic and [short test] salary figures," than previously existed, resulting in an approximately 143 percent ratio between the highest long test salary level (professional) and the short test. 35 FR 885. From 1949 to 1975 the Department set a single short test salary level that applied to all categories of EAP employees while maintaining multiple long test salary levels that applied to the different categories. The ratio of the short test salary level to the long test salary levels ranged from approximately 130 percent to 180 percent over this period.[24] The existence of separate short and long tests remained part of the Department's regulations until 2004. *See* Table A.

In setting the long test salary level in 1958, the Department considered data collected during 1955 WHD investigations on the "actual salaries paid" to employees who "qualified for exemption" (*i.e.,* met the applicable salary and duties tests), grouped by geographic region, broad industry groups, number of employees, and city size, and supplemented with BLS and Census data to reflect income increases of white collar and manufacturing employees during the period not covered by the Department's investigations. Kantor Report at 6. The Department then set the long test salary levels for exempt employees "at about the levels at which no more than about 10 percent of those in the lowest-wage region, or in the smallest size establishment group, or in the smallest-sized city group, or in the lowest-wage industry of each of the categories would fail to meet the tests." *Id.* at 6–7. In other words, the Department set the long test salary level so that only a limited number of workers performing EAP duties (about 10 percent) in the lowest-wage regions and industries would fail to meet the salary level test and therefore be overtime protected. In laying out this methodology, the Department echoed comments from the Weiss Report that the salary tests "simplify enforcement by providing a ready method of screening out the obviously nonexempt employees," and that "[e]mployees that do not meet the salary test are generally also found not to meet the other requirements of the regulations." *Id.* at 2–3. The Department also noted that in our experience misclassification of overtime-protected employees occurs more frequently when the salary levels have "become outdated by a marked upward movement of wages and salaries." *Id.* at 5.

The Department followed a similar methodology when determining the appropriate long test salary level increase in 1963, using data regarding salaries paid to exempt workers collected in a 1961 WHD survey. *See* 28 FR 7002. The salary level for executive and administrative employees was increased to $100 per week, for example, when the 1961 survey data showed that 13 percent of establishments paid one or more exempt executives less than $100 per week, and 4 percent of establishments paid one or more exempt administrative employees less than $100 a week. *See* 28 FR 7004. The professional exemption salary level was increased to $115 per week, when the 1961 survey data showed that 12 percent of establishments surveyed paid one or more professional employees less than $115 per week. *See id.* The Department noted that these salary levels approximated the same percentages used in 1958:

> Salary tests set at this level would bear approximately the same relationship to the minimum salaries reflected in the 1961 survey data as the tests adopted in 1958, on the occasion of the last previous adjustment, bore to the minimum salaries reflected in a comparable survey, adjusted by trend data to early 1958. At that time, 10 percent of the establishments employing executive employees paid one or more executive employees less than the minimum salary adopted for executive employees and 15 percent of the establishments employing administrative or professional employees paid one or more employees employed in such capacities less than the minimum salary adopted for administrative and professional employees.

Id.

The Department continued to use a similar methodology when updating the long test salary levels in 1970. After examining data from 1968 WHD investigations, 1969 BLS wage data, and information provided in a report issued by the Department in 1969 that included salary data for executive, administrative, and professional employees,[25] the Department increased the long test salary level for executive employees to $125 per week when the salary data showed that 20 percent of executive employees from all regions and 12 percent of executive employees in the West earned less than $130 a week. *See* 35 FR 884–85. The Department also increased the long test salary levels for administrative and professional employees to $125 and $140, respectively.

In 1975, instead of following these prior approaches, the Department set the long test salary levels based on increases in the Consumer Price Index (CPI), although the Department adjusted the salary level downward "in order to eliminate any inflationary impact." 40 FR 7091. As a result of this recalibration of the 1970 levels, the long test salary level for the executive and administrative exemptions was set at $155, while the professional level was set at $170. The salary levels adopted were intended as interim levels "pending the completion and analysis of a study by [BLS] covering a six month period in 1975," and were not meant to set a precedent for future salary level increases. *Id.* at 7091–92. Although the Department intended to revise the salary levels after completion of the BLS study of actual salaries paid to employees, the envisioned process was never completed, and the "interim" salary levels remained unchanged for the next 29 years.

As reflected in Table A, the short test salary level increased in tandem with the long test level throughout the various rulemakings since 1949. Because the short test was designed to capture only those white collar employees whose salary was sufficiently high to indicate a stronger likelihood of exempt status and thus warrant a less stringent duties requirement, the short test salary level was always set significantly higher than the long test salary levels. Thus, in 1975 while the long test salary levels ranged from $155 to $170, the short test level was $250.

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[24] The smallest ratio occurred in 1963 and was between the long test salary requirement for professionals ($115) and the short test salary level ($150). The largest ratio occurred in 1949 and was between the long test salary requirement for executives ($55) and the short test salary level ($100).

[25] Earnings Data Pertinent to a Review of the Salary Tests for Executive, Administrative and Professional Employees As Defined in Regulations Part 541, (1969), *cited in* 34 FR 9935.

The salary level test was most recently updated in 2004, when the Department abandoned the concept of separate long and short tests, opting instead for one "standard" test, and set the salary level associated with the new standard duties test at $455 for executive, administrative, and professional employees. Due to the lapse in time between the 1975 and 2004 rulemakings, the salary threshold for the long duties tests (*i.e.,* the lower salary level) did not reflect salaries being paid in the economy and had become ineffective at distinguishing between overtime-eligible and overtime exempt white collar employees. For example, at the time of the 2004 Final Rule, the salary levels for the long duties tests were $155 for executive and administrative employees and $170 for professional employees, while a full-time employee working 40 hours per week at the federal minimum wage ($5.15 per hour) earned $206 per week. *See* 69 FR 22164. Even the short test salary level at $250 per week was not far above the minimum wage.

The Department in the 2004 Final Rule based the new "standard" duties tests on the short duties tests (which did not limit the amount of nonexempt work that could be performed), and tied them to a single salary test level that was updated from the long test salary (which historically had been paired with a cap on nonexempt work). *See* 69 FR 22164, 22168–69; *see also* 68 FR 15570 ("Under the proposal, the minimum salary level to qualify for exemption from the FLSA minimum wage and overtime requirements as an executive, administrative, or professional employee would be increased from $155 per week to $425 per week. This salary level would be referred to as the 'standard test,' thus eliminating the 'short test' and 'long test' terminology."). The Department concluded that it would be burdensome to require employers to comply with a more complicated long duties test given that the passage of time had rendered the long test salary level largely obsolete. *See* 69 FR 22164; 68 FR 15564–65. The Department stated at the time that the new standard test salary level accounted for the elimination of the long duties test. *See* 69 FR 22167.

In determining the new salary level in 2004, the Department reaffirmed our oft-repeated position that the salary level is the "best single test" of exempt status. *See* 69 FR 22165. Consistent with prior rulemakings, the Department relied on actual earnings data. However, instead of using salary data gathered from WHD investigations, as was done under the Kantor method, the Department used Current Population Survey (CPS) data that encompassed most salaried employees. The Department also set the salary level to exclude roughly the bottom 20 percent of these salaried employees in each of the subpopulations: (1) The South and (2) the retail industry. Thus in setting the standard salary level, the Department was consistent with our previous practice of setting the long test salary level near the lower end of the current range of salaries. Although prior long test salary levels were based on salaries of approximately the lowest 10 percent of exempt salaried employees in low-wage regions and industries (the Kantor long test method), the Department stated that the change in methodology was warranted in part to account for the elimination of the short and long duties tests, and because the utilized data sample included nonexempt salaried employees, as opposed to only exempt salaried employees. However, as the Department acknowledged, the salary arrived at by this method was, in fact, equivalent to the salary derived from the Kantor long test method. *See* 69 FR 22168. Based on the adopted methodology, the Department ultimately set the salary level for the new standard test at $455 per week.

In summary, the regulatory history reveals a common methodology used, with some variations, to determine appropriate salary levels. In almost every case, the Department examined a broad set of data on actual wages paid to salaried employees and then set the long test salary level at an amount slightly lower than might be indicated by the data. In 1940 and 1949, the Department set the long test salary levels by looking to the average salary paid to the lowest level of exempt employees. Beginning in 1958, the Department set the long test salary levels to exclude approximately the lowest-paid 10 percent of exempt salaried employees in low-wage regions, employment size groups, city sizes, and industry sectors, and we followed a similar methodology in 1963 and 1970. The levels were based on salaries in low-wage categories in order to protect the ability of employers in those areas and industries to utilize the exemptions and in order to mitigate the impact of salaries in higher-paid regions and sectors. In 1975, the Department increased the long test salary levels based on changes in the CPI, adjusting downward to eliminate any potential inflationary impact. *See* 40 FR 7091 ("However, in order to eliminate any inflationary impact, the interim rates hereinafter specified are set at a level slightly below the rates based on the CPI."). In each of these rulemakings, the Department set the short test salary level in relation to, and significantly higher than, the long test salary levels (ranging from approximately 130 to 180 percent of the long test salary levels).

In 2004, the Department eliminated the short and long duties tests in favor of a standard duties test (that was similar to the prior less rigorous short test) for each exemption and a single salary level for executive, administrative, and professional employees. This most recent revision established a standard salary level of $455 per week using earnings data of full-time salaried employees (both exempt and nonexempt) in the South and in the retail sector. As in the past, the Department used lower-salary data sets to accommodate those businesses for which salaries were generally lower due to geographic or industry-specific reasons.

ii. Standard Salary Level Proposal

To restore the effectiveness of the salary test, in the NPRM the Department proposed to set the standard salary level equal to the 40th percentile of weekly earnings of full-time salaried workers nationally. Using salary data from 2013, the proposed methodology resulted in a standard salary level of $921 per week, or $47,892 annually. The Department estimated that, by the time of publication of a Final Rule, the proposed methodology would result in a standard salary level of approximately $970 per week, or $50,440 annually.

In proposing to update the salary threshold, the Department sought to reflect increases in actual salary levels nationwide since 2004. As the Department explained in the NPRM, when left at the same amount over time, the effectiveness of the salary level test as a means of determining exempt status diminishes as the wages of employees entitled to overtime increase and the real value of the salary threshold falls. *See* 80 FR 38517.

The Department also sought to adjust the salary level to address our conclusion that the salary level we set in 2004 was too low given the Department's elimination of the more rigorous long duties test. As discussed above, for many decades the long duties test—which limited the amount of time an exempt employee could spend on nonexempt duties and was paired with a lower salary level—existed in tandem with a short duties test—which did not contain a specific limit on the amount of nonexempt work and was paired with a salary level that was approximately 130 to 180 percent of the long test salary level. In 2004, the Department eliminated the long and short duties tests and created the new standard duties test, based on the short duties test. The creation of a single standard test that did not limit nonexempt work caused new uncertainty as to what salary level is sufficient to ensure that employees intended to be overtime-protected are not subject to inappropriate classification as not overtime-protected, while minimizing the number of employees disqualified from the exemption even though their primary duty is EAP exempt work. As the Department had observed in 1975, if the salary level associated with such a test is too low, employers may use it to inappropriately classify as exempt employees who would not meet the more rigorous long duties test. 40 FR 7092 ("[T]here are indications that certain employers are utilizing the high salary test to employ otherwise nonexempt employees (*i.e.,* those who perform work in excess of the 20 percent tolerance for nonexempt work or the 40 percent tolerance allowed in the case of executive and administrative employees in retail and service establishments) for excessively long workweeks."). Rather than pair the standard duties test with a salary level based on the higher short test salary level, however, we tied the new standard duties test to a salary level based on the long duties test. This resulted in a standard salary level that, even in 2004, was too low to effectively screen out from the exemption overtime-eligible white collar employees.

The importance of ensuring that the standard duties test is not paired with too low of a salary level is illustrated by the Department's *Burger King* litigation in the early 1980's, when the short and long tests were still actively in use. The Department brought two actions arguing that Burger King assistant managers were entitled to overtime protection. *Sec'y of Labor* v. *Burger King Corp.,* 675 F.2d 516 (2d Cir. 1982); *Sec'y of Labor* v. *Burger King Corp.,* 672 F.2d 221 (1st Cir. 1982). One group of assistant managers satisfied the higher short test salary level and was therefore subject to the less rigorous short duties test; the other group was paid less and was therefore subject to the long duties test with its limit on nonexempt work. All of the assistant managers performed the same duties, which included spending significant amounts of time performing the same routine, nonexempt work as their subordinates. Both appellate courts found that the higher paid employees were not overtime protected—even though they performed substantial amounts of nonexempt work—because they satisfied the short duties test. The lower paid employees, however, were overtime-protected by application of the more rigorous long duties test. If the long test's lower salary threshold had been paired with a duties test that did not limit nonexempt work—as the Department did in 2004—the lower paid assistant managers would have also lost overtime protection.

In this rulemaking, the Department sought to correct the mismatch between the standard salary level (based on the old long test) and the standard duties test (based on the old short test). As we noted in the NPRM, we are concerned that at the current low salary level employees in lower-level management positions who would have failed the long duties test may be inappropriately classified as ineligible for overtime. At the same time, the Department proposed a lower salary level than the average salary traditionally used for the short duties test in order to minimize the potential that bona fide EAP employees, especially in low-wage regions and industries, might become overtime-protected because they fall below the proposed salary level. As the Department explained, an up-to-date and effective salary level protects against the misclassification of overtime-eligible workers as exempt and simplifies application of the exemption for employers and employees alike.

Consistent with prior rulemakings, the Department reached the proposed salary level after considering available data on actual salary levels currently being paid in the economy. Specifically, as we did in 2004, the Department used CPS data comprising full-time nonhourly employees to determine the proposed salary level. Unlike in the 2004 rulemaking, however, the Department did not further restrict the data by filtering out various employees based on statutory and regulatory exclusions from FLSA coverage or the salary requirement (such as federal employees, doctors, lawyers, and teachers).

The Department proposed to set the salary level as a percentile rooted in the distribution of earnings rather than a specific dollar amount. Because earnings are linked to the type of work salaried workers perform, a percentile serves as an appropriate proxy for distinguishing between overtime-eligible and overtime exempt white collar workers. Based on the historical relationship of the short test salary level to the long test salary level, the Department determined that a salary between approximately the 35th and 55th percentiles of weekly earnings of full-time salaried workers nationwide would work appropriately with the standard duties test. The Department proposed to set the salary level at the low end of this range—the 40th percentile of weekly earnings of full-time salaried workers nationally—to account for low-wage regions and industries and for the fact that employers no longer have a long duties test to fall back on for purposes of exempting lower-salaried workers performing bona fide EAP duties. The Department explained, however, that a standard salary threshold significantly below the 40th percentile would require a more rigorous duties test than the current standard duties test in order to effectively distinguish between white collar employees who are overtime protected and those who may be bona fide EAP employees. *See* 80 FR 38519, 38532, 38543.

iii. Final Revisions to the Standard Salary Level

The Final Rule adopts the proposed methodology for setting the standard salary level as a percentile of actual salaries currently being paid to full-time nonhourly employees, as reported by BLS based on data obtained from the CPS. However, we have adjusted the data set used in response to a substantial number of comments asserting that the salary level proposed would render overtime-eligible too many bona fide EAP employees in low-wage areas. Rather than set the salary level at the 40th percentile of weekly earnings of full-time salaried workers nationally, this Final Rule sets the salary level at the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region. Census Regions are groupings of states and the District of Columbia that subdivide the United States for the presentation of data by the United States Census Bureau. The current Census Regions are: The Northeast, the Midwest, the South, and the West.[26] The Department determined the "lowest-wage Census Region" by examining the 40th percentile of weekly earnings of full-time salaried workers based on CPS data in each region. For the purposes of this rulemaking, we define the "lowest-wage Census Region" as the Census Region having the lowest

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[26] *See https://www.census.gov/geo/reference/gtc/gtc_census_divreg.html.*

40th percentile of weekly earnings of full-time salaried workers, which currently is the South.[27]

In keeping with our practice, the Department relies on the most up-to-date data available to derive the final salary level from this methodology. *See* 69 FR 22168. In the NPRM, the Department utilized 2013 salary data for estimating the salary level resulting from the proposed methodology, which was current at the time the Department developed the proposal. In this Final Rule, we rely on salary data from the fourth quarter of 2015, as published by BLS, to set the salary level.[28] Using this data, the Department has determined that the required standard salary level will be $913 per week, or $47,476 annually, based on the 40th percentile of weekly earnings of full-time salaried workers in the South. The $913 salary level that results from the methodology is at the low end of the historical range of short test salary levels, based on the historical ratios between the short and long test salary levels ($889–$1231). *See* section VI.C.iii.

White collar employees subject to the salary level test earning less than $913 per week will not qualify for the EAP exemption, and therefore will be eligible for overtime, irrespective of their job duties and responsibilities. Employees earning this amount or more on a salary or fee basis will qualify for exemption only if they meet the standard duties test, which is unchanged by this Final Rule. As a result of this increase, 4.2 million employees who meet the standard duties test will no longer fall within the EAP exemption and therefore will be overtime-protected. Additionally, 8.9 million employees paid between $455 and $913 per week who do not meet the standard duties test—5.7 million salaried white collar employees and 3.2 million salaried blue collar employees—will now face a lower risk of misclassification.

iv. Discussion of Comments

1. Proposed Increase in the Standard Salary Level

The overwhelming majority of commenters agreed that the standard salary level needs to be increased, including many commenters writing on behalf of employers, such as the Business Roundtable, Catholic Charities USA, College and University Professional Association for Human Resources (CUPA–HR), CVS Health, the National Restaurant Association (NRA), and the Northeastern Retail Lumber Association. Multiple commenters echoed the Department's observation in the NPRM that the current standard salary level of $455 per week, or $23,660 annually, is below the 2014 poverty threshold for a family of four.[29] The American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) pointed out that the current salary level is only slightly higher than the state minimum wage for forty hours of work in several states, and noted that it has long been widely recognized that workers whose pay is "close to the minimum wage" are "not the kind of employees Congress intended to deny overtime protection" (citing Stein Report at 5). Some salaried employees currently classified as exempt managers commented that they earn less per hour than the employees they supervise.

The Department also received multiple comments, including comments from the American Sustainable Business Council and the Heartland Alliance for Human Needs and Human Rights, expressing concern that the current salary level facilitates the misclassification of overtime-eligible employees as overtime exempt. The RAND Corporation submitted a study estimating that 11.5 percent of salaried workers are misclassified as exempt—and therefore do not receive overtime compensation—even though their primary duty is not exempt work or they earn less than the current salary level, while a human resource professional from Florida "estimate[d] that 40 percent of those employees my clients class[ify] as . . . exempt are really non-exempt."

A few commenters, however, such as the National Grocers Association (NGA), urged the Department to maintain the current salary level of $455 per week. For example, the National Lumber and Building Material Dealers Association stated that the current salary level is appropriate for managers in many sectors and regions. Mutual of Omaha requested that the Department create a "grandfathered exemption," by applying the current salary level to currently exempt employees.

The Department received a significant number of comments in response to our proposal to set the standard salary level equal to the 40th percentile of weekly earnings of full-time salaried employees nationally (estimated to be $970 per week, or $50,440 per year, in 2016). Many commenters endorsed the proposed salary level as an appropriate dividing line between employees performing exempt and overtime-protected work, but others objected that it was either too low or too high. The majority of employees and commenters representing employees believed the proposed salary level amount was appropriate or should be increased, while the majority of employers and commenters representing them believed the salary level amount should be lower than the threshold the Department proposed.

A large number of commenters supported the proposed salary level either by explicitly endorsing the proposed increase or supporting the Department's proposed rule generally. Commenters who supported the salary level included thousands of individual employees, writing independently or as part of comment campaigns, and organizations representing employees (such as the American Association of Retired Persons (AARP), the Coalition of Labor Union Women, National Council of La Raza, the National Domestic Workers Alliance (NDWA), the National Partnership for Women & Families (Partnership), Service Employees International Union (SEIU), the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW), and many others). Some employers and human resource professionals also supported the proposed increase. For example, the owner of a hardware store in Minneapolis explained that he had observed "large businesses abuse their employees for many years by misclassifying them as exempt from overtime," and stated that the Department's proposal would "help bring things back in line." H–E–B stated that it pays "competitive wages," and is "supportive of doubling the minimum salary threshold to the proposed amount of $50,400," although it urged the Department to consider making regional adjustments because other retailers pay lower wages based on geographic differences. Some Members of Congress expressed support for the Department's proposal, although other Members of Congress opposed it.

The Department received many comments from those who endorsed the proposal (as well as those seeking a higher salary level) asserting that a significant increase to the current salary level is necessary to effectuate Congress' intent to extend the FLSA's wage and hour protections broadly to most workers in the United States. *See, e.g.,*

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[27] For simplicity, in this rulemaking we refer to the lowest-wage Census Region and the South interchangeably.

[28] BLS currently publishes this data at: *http://www.bls.gov/cps/research_series_earnings_nonhourly_workers.htm.*

[29] The 2015 poverty threshold for a family of four with two related people under 18 in the household is $24,036. Available at: *http://www.census.gov/hhes/www/poverty/data/threshld/index.html.*

Comment from 57 labor law professors; AFL–CIO; Equal Justice Center; National Employment Lawyers Association (NELA); Nichols Kaster law firm; SEIU. AFL–CIO stated that Congress intended the EAP exemptions to apply only to employees who have sufficient bargaining power such that they do not need the Act's protections against overwork and who perform work that cannot be easily spread to other workers. AFL–CIO and the EPI further stated that Congress knew from experience with Depression-era worker protection legislation that employers sometimes misclassified ordinary workers as managers to evade paying overtime premiums, and as a result, exempted only "bona fide" executive, administrative, and professional employees. The National Employment Law Project (NELP) commented that the Department set the salary level too low in 2004, especially when paired with a more lenient duties test than the prior long duties test. A comment submitted on behalf of 57 labor law professors noted that, even if the Department had paired the $455 per week standard salary level set in 2004 with a more rigorous duties test, it was still lower than necessary to achieve a threshold equivalent to the inflation-adjusted amount of the 1975 long test salary level.

The Department agrees with commenters that a significant increase in the salary threshold is required to ensure the FLSA's overtime protections are fully implemented. The salary level test should provide an "index to the 'bona fide' character of the employment for which exemption is claimed" and ensure that the EAP exemption "will not invite evasion" of the FLSA's minimum wage and overtime requirements "for large numbers of workers to whom the wage-and-hour provisions should apply." Stein Report at 19. The current salary level, however, is less than the 10th percentile of weekly earnings of full-time salaried workers both nationally and in the South. The salary threshold's function in differentiating exempt from nonexempt employees takes on greater importance, moreover, when there is only one standard duties test that has no limitation on the amount of nonexempt work that an exempt employee may perform, as has been the case since 2004. As the Department has long recognized, if too low a salary level accompanies a duties test that does not limit nonexempt work, employers may utilize the salary test to employ "otherwise nonexempt employees," who perform large amounts of nonexempt work, "for excessively long workweeks." 40 FR 7092. The Department believes that the effect of the 2004 Final Rule's pairing of a standard duties test based on the short duties test (for higher paid employees) with a salary test based on the long test (for lower paid employees) was to exempt from overtime many lower paid workers who performed little EAP work and whose work was otherwise indistinguishable from their overtime-eligible colleagues.[30] This has resulted in the inappropriate classification of employees as EAP exempt who pass the standard duties test but would have failed the long duties test. A significant increase from the 2004 threshold is therefore necessary, not only to account for the declining real value of the salary threshold, but also to correct for the fact that the Department set the standard salary level in 2004 without adjusting for the elimination of the more rigorous long duties test.

Many commenters (including some that believe that the proposed salary level is reasonable) urged the Department to choose a method that results in a higher salary level. The vast majority of these commenters, including NELA, Nichols Kaster, the Rudy, Exelrod, Zieff & Lowe law firm, the Texas Employment Lawyers Association, and the United Food and Commercial Workers International Union (UFCW), asserted that the Department should set the standard salary level equal to the 50th percentile of earnings of full-time salaried workers nationally. The Center for Effective Government stated that the Department should set the standard salary level equal to the 60th percentile of earnings of full-time salaried workers nationally. NELP recommended that the Department adjust for inflation the short test salary level adopted by the Department in 1975, or in the alternative, adopt a threshold of $1,122 per week.

Commenters, such as the UFCW, pointed out that the Department's proposed salary is lower than the average historical salary ratio associated with the short duties test, which is the basis for the standard duties test. Multiple commenters noted that the proposed salary level covers a smaller share of all salaried workers (40 percent) than the 1975 short test salary level, which covered 62 percent of full-time salaried employees. *See, e.g.,* AFL–CIO; NELA; Rudy, Exelrod, Zieff & Lowe. NELA stated that the 1975 short test salary level was 1.57 times the median wage of all full-time wage and salary workers, a ratio which they asserted would result in a current salary threshold of over $65,000 per year based on first quarter 2015 data. EPI commented that the proposed salary level is lower than the short test salary levels adopted by the Department in the 1960s and 1970s, when adjusted for inflation to 2013 dollars. EPI also asserted that the salary threshold should be higher than the inflation-adjusted amounts of short test salary levels from the past in part to account for the fact that management and professional salaries grew faster than the rate of inflation after 1970, noting that CEO pay among the top 350 U.S. corporations was almost 11 times higher in 2014 than it was in 1978, after adjusting for inflation. Other commenters, including USW, similarly cited the large growth in high-level executive pay in recent decades in support of the Department's proposal.

Commenters urging a higher salary level also asserted that the Department's proposed salary level excludes from overtime protection too large a percentage of employees in traditionally nonexempt occupations and is too low to adequately minimize the risk of inappropriately classifying overtime-eligible workers as overtime exempt. AFL–CIO stated that the Department has previously set the long test salary level at an amount about 25 percent higher than the average starting salary for newly hired college graduates, and they asserted that this would yield a standard salary level of $52,000 per year. AFL–CIO contended that the salary test must be set at a "high enough level that large numbers of eligible workers are not stranded above the threshold." NELA likewise urged the Department to "aim for a threshold where the number of non-exempt employees earning salaries above the threshold equals the number of otherwise exempt employees earning less than the threshold"—an amount we estimated in the NPRM would be roughly equal to the 50th percentile of weekly earnings of full-time salaried workers nationally. *See* 80 FR 38560.

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[30] Jobs With Justice illustrated this phenomenon in its comment by recounting the experience of a store manager who was classified as exempt even though she made only $34,700 per year and regularly worked 70 hours per week, spending her time performing routine tasks such as "unloading merchandise from trucks, stocking shelves and ringing up purchases." *See also In re Family Dollar FLSA Litigation,* 637 F.3d 508, 511, 516–18 (4th Cir. 2011) (holding that a retail manager paid $655 per week plus bonus was an exempt executive even though she "devoted most of her time to doing . . . mundane physical activities" such as unloading freight, stocking shelves, working the cash register, or sweeping the floors); *Soehnle* v. *Hess Corp.,* 399 Fed. App'x 749, 750 (3d Cir. 2010) (holding that a gas station manager who was paid an annual salary of $34,000, worked approximately 70 hours per week, and spent 85 percent of time operating a cash register was an exempt executive).

The Department understands commenters' concerns that the proposed standard salary level was lower than the 50th percentile of full-time salaried workers ($1,065 based on 2013 data) and updating the 1975 short test salary ($1,083 based on 2013 data). As the Department stated in the NPRM, however, we are concerned that a standard salary threshold at that level, in the absence of a lower salary long test to fall back on, would deny employers the ability to use the exemption for too many employees in low-wage areas and industries who perform EAP duties.

In contrast to commenters representing employees, a great number of commenters representing employers and many individual employers objected that the Department's proposed salary level was too high. While commenters supporting the proposed threshold or advocating for a higher threshold asserted that the proposal is lower than indicated by historical *short* test levels, commenters advocating for a lower threshold asserted that the proposed threshold is out of step with historical *long* test levels. For example, the Jackson Lewis law firm asserted that the proposed threshold is higher than any past long test salary level for the executive exemption, when adjusted for inflation to 2015 dollars. The Chamber stated that the ratio of the proposed salary level to the minimum wage is too high, based on an analysis they performed that weighted the historic long test salary levels three times more heavily than historic short test salary levels.

Some commenters requesting a lower salary threshold, such as the American Association of Orthopaedic Executives, Associated Builders and Contractors (ABC), and the Montana Conservation Corps, urged the Department to instead adjust the 2004 salary level for inflation. Many others stated that the Department should set the salary level at the 20th percentile of earnings of full-time salaried employees in the South and in the retail industry, as we did in 2004. *See, e.g.,* American Hotel and Lodging Association (AH&LA); Dollar Tree; NRF. The NRA stated that it could support Alternative 3 in the NPRM, a salary level derived from the Kantor long test method taking the 10th percentile of earnings of *likely exempt* employees in low-wage regions, employment size groups, city sizes, and industries. Fisher & Phillips urged the Department to set the salary level at the 20th percentile of earnings of *exempt* employee salaries "in the lowest geographical and industry sectors." Some commenters suggested a lower percentile of full-time salaried workers nationwide than the Department proposed. For example, the Chamber, which preferred that the Department use a different data source set to set the salary level, stated in the alternative that a salary level at up to the 30th percentile of earnings of full-time salaried workers nationally would "better reflect the actual dividing line between exempt and non-exempt employees." In addition, several commenters focused on the salary level amount rather than, or in addition to, the methodology used to derive the level. For example, a non-profit organization providing senior care recommended a salary level of up to $40,000; FMI stated that most of its grocer members would not see a significant disruption at a salary level of up to $38,376; and the BOK Financial Corporation advocated for a $30,000 salary level. Finally, some commenters, such as the Partnership to Protect Workplace Opportunity (PPWO) and IFA, asserted that the Department's proposed salary level should be lower, but declined to propose a specific number or method. Most of these suggestions do not represent a meaningful departure from the methodology the Department has historically used to set the lower long test salary level, and the Department does not believe that these suggested salary levels are sufficient to account fully for the elimination of the long duties test, as explained below.

The Department received many comments stating that by using a nationwide data set, the proposal fails to adequately account for salary disparities among regions and areas, industries, and firms of different sizes. Some commenters, including the Assisted Living Federation of America and the American Seniors Housing Association (ALFA), Jackson Lewis, and PPWO, asserted that adopting the proposal would effectively eliminate the exemption for certain industries or in certain parts of the country and, as a result, would exceed the Department's statutory authority.

Multiple commenters asserted that the proposed salary level is too high for low-wage regions. *See, e.g.,* Chamber; FMI; International Association of Amusement Parks and Attractions; King's Daughters' School; NRF; PPWO; Society for Human Resource Management (SHRM); and many individual commenters. Several commenters cited to an analysis conducted by Oxford Economics finding that in eight southern states—Arkansas, Florida, Louisiana, Mississippi, North Carolina, Oklahoma, Tennessee, and West Virginia—more than 50 percent of nonhourly workers earn less than $970 per week, the amount the Department predicted the proposed salary level would be in 2016. PPWO cited to a study showing that 100 percent of first-line supervisors of food preparation and serving workers in Mississippi—an occupational category for which the Department predicted 10 to 50 percent of workers would likely pass the duties test when we quantified the impact of our proposal[31]—would fall below the proposed salary level. The National Association of Home Builders (NAHB) analyzed state-level data and found that 50 percent or more of first line construction supervisors in Arkansas, Mississippi, New Mexico, and Tennessee would be affected by the Department's proposal. The National Network to End Domestic Violence commented that for one of its member organizations in a rural state, nine out of eleven staff members earn less than the proposed salary level, and a lender with locations across Alabama, Louisiana, Mississippi, and Tennessee stated that 81 percent (62 out of 74) of its branch managers earn less than $51,000 per year in base salary. Some commenters, for example, the HR Policy Association and National Association of Manufacturers (NAM), expressed concern that employees performing the same duties will be exempt in one location but overtime protected in another.

In addition to these comments, multiple commenters noted that salaries may vary widely within a state or region, especially between rural or smaller communities and urban areas. Several commenters, including Columbia County, Pennsylvania, Community Transportation Association of the Northwest, Elk Valley Rancheria Indian Tribe, Jackson Lewis, the Jamestown S'Klallam Tribe, the National Board for Certified Counselors, the National Newspaper Association, NRF, and the Northern Michigan Chamber Alliance, commented that the proposed salary level is too high for rural areas and small communities. HR Policy Association stated that 14 percent of chief executives and 32 percent of general and operations managers in small cities and rural areas earn less than the salary level calculated using the proposed methodology and 2014 data. Commenters also compared earnings and the cost of living in lower-wage communities to very high wage urban areas and asserted that the

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[31] *See* Table A2—Probability Codes by Occupation, 80 FR 38594; *see also* 80 FR 38553–54.

Department's proposal fails to fully analyze and take into account these differences. *See, e.g.,* America Outdoors (comparing rural areas to Washington, DC, New York City, and San Francisco); Ashley Manor LLC; National Pest Management Association.

Several commenters also asserted that the proposed salary level ($50,440 based on projections for 2016) would have a disproportionate impact on employers in low-wage industries, such as the retail and restaurant industries. HR Policy Association stated that in the retail, accommodation, and food services and drinking places industries, over one-third of general and operations managers would fall below the proposed salary level in 2014 dollars. FMI stated that "millions of employees in retail who clearly meet the duties requirements for retail earn below $50,000." NRA cited a 2014 survey finding that the median base salary paid to restaurant managers is $47,000 and to crew and shift supervisors is $38,000, and multiple chain restaurant businesses submitted comments stating that if the Department increased the salary level to our proposed threshold and updated it annually, "there might be no exempt employees in many of our restaurants."

The Department also heard from multiple commenters, such as IFA, the National Federation of Independent Businesses (NFIB), NGA, the National Independent Automobile Dealers Association, the National Newspaper Association, Senator David Vitter, and Representative James Inhofe, that our proposal would have a disproportionate impact on small businesses. The Office of Advocacy of the United States Small Business Administration (Advocacy) stated that the proposed salary threshold would "add significant compliance costs . . . . on small entities, particularly to businesses in low-wage regions and in industries that operate with low profit margins."

Several commenters, including the Chamber, Littler Mendelson, Fisher & Phillips, and the Seyfarth Shaw law firm, noted that the Department has historically adjusted the salary level to account for low-wage regions and industries and small establishments, and asserted that the Department failed to do so in this rulemaking. These and other commenters urged the Department to account for such variations by setting the salary level at a point near the lower range of salaries in the lowest-wage regions or industries. For example, among other alternatives, the Chamber asked the Department to consider setting the salary level at the 40th percentile of earnings of full-time salaried employees in Louisiana, Mississippi, and Oklahoma ($784 per week or $40,786 annually), which it described as the three states with the lowest salaries. Many other commenters, including the International Bancshares Corporation, the National Association of Federal Credit Unions, the National Council of Young Men's Christian Associations of the United States of America (YMCA), and many individual commenters, urged the Department to adopt different salary levels for different regions of the country or for different industries or sizes of businesses.

Commenters representing employee interests, however, disagreed that the Department should make further adjustment for low-wage regions and industries. EPI commented that because the Department's proposed standard salary level falls within historic short test levels, the Department's earlier adjustments to account for regional wage disparities are "baked in." *See also* AFL–CIO. This is because the Department historically set the short test level as a function of a long test level, which had been adjusted to reflect low-wage regions and industries. UFCW similarly asserted that the Department should not have proposed a salary threshold lower than the average short test salary level to account for low-wage regions and industries, because the data from which the Department drew the percentile includes the earnings of employees in low-wage industries and regions. In addition, AFL–CIO and EPI stated that the Department should be less concerned about the impact of regional wage variation than in prior rulemakings. According to an analysis conducted by EPI, over the past four decades, wages in lower-wage states have "moved much closer to national norms."

The Department has considered these comments and appreciates the strong views in this area. While our proposal did account for lower salaries in some regions and industries by setting the salary level lower than both the average historical salary ratio associated with the short duties test ($1,019 per week according to the data set used in the Final Rule) and the median of full-time salaried workers ($1,146 according to the data set used in the Final Rule), we have determined that further adjustment to account for regional variation is warranted. The proposed salary level ($972 based on the fourth quarter 2015 data) is in the lowest quarter of the historical range of the short test salary, but it is not at the bottom of the range, and based on the comments, we are concerned that this salary would not sufficiently account for regional variation in wages. Accordingly, we have adjusted the data set used to set the salary level to further reflect salary disparities in low-wage areas. Under this Final Rule, the Department will set the standard salary level equal to the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region. Based on fourth quarter 2015 data, the lowest-wage Census Region is the South, and the 40th percentile of weekly earnings of full-time salaried workers in the South is $913.[32] *See* Table B. By comparison, the 40th percentile nationally is $972, and the 40th percentile in the highest-wage Census Region (the West) is $1,050.

TABLE B—40TH PERCENTILE OF EARNINGS FOR FULL-TIME SALARIED WORKERS BY CENSUS REGION

Census region	40th percentile of earnings of full-time salaried workers (in 4th quarter 2015)
South	$913
Midwest	994
Northeast	1,036
West	1,050
All Census Regions	972

This adjustment will ensure that the salary level "is practicable over the broadest possible range of industries, business sizes and geographic regions." 69 FR 22171 (citing Kantor Report at 5). Setting the salary level equal to the weekly earnings of the 40th percentile of full-time salaried workers in the lowest-wage Census Region represents the 22nd percentile of *likely exempt* employees in the South, the 19th percentile of *likely exempt* employees in the Midwest, and the 16th percentile of *likely exempt* employees in both the West and the Northeast.[33] The 40th percentile of full-time salaried workers in the South also represents the 20th percentile of *likely exempt* employees working in small establishments and the 28th percentile of *likely exempt* employees who do not live in metropolitan areas.[34] This increase from the traditional 10 percent of exempt employees excluded by the Kantor long test method reflects the shift to a salary level appropriate to the standard duties test. Because the long duties test included a limit on the amount of nonexempt work that could be performed, it could be paired with a low salary that excluded few employees performing EAP duties. In the absence of such a limitation in the duties test, it is necessary to set the salary level higher (resulting in the exclusion of more employees performing EAP duties) because the salary level must perform more of the screening function previously performed by the long duties test. Accordingly the salary level set in this Final Rule corrects for the mismatch in the 2004 Final Rule between a low salary threshold and a less rigorous duties test.

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[32] The South Census Region includes Alabama, Arkansas, Delaware, the District of Columbia, Georgia, Florida, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia.

[33] The population for determining employees who are likely exempt under the standard duties test is limited to potentially affected EAP workers (*i.e.,* white collar, salaried, not eligible for another non-EAP overtime exemption, and not in a named occupation) earning at least $455 but less than $913.

The decrease in the salary level due to the change to the lowest-wage region data set addresses commenters' concerns that the salary test would eliminate the exemption for certain industries or certain parts of the country. For example, while PPWO asserted that the proposed salary level would have excluded from the exemption *all* first line supervisors of food preparation and service workers in Mississippi, the revised salary level adopted in this Final Rule excludes only 78 percent of these workers. This leaves 22 percent of such workers covered by the exemption in Mississippi—appropriately within the 10 to 50 percent of employees in this occupation nationwide predicted to pass the standard duties test under the Department's probability codes. *See* section VI Appendix A. Likewise, 55 percent of first line supervisors of construction trades and extraction workers in the South earn above the Final Rule's salary threshold, even though only 0 to 10 percent of such workers nationwide are likely to pass the standard duties test. *Id.* The revised salary is approximately equivalent to the 2014 median base salary paid to restaurant managers cited by NRA.

Setting the salary level equal to the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region is consistent with the Department's historical practice of examining a broad set of data on actual wages paid to salaried employees and then setting the salary level at an amount slightly lower than might be indicated by the data. In addition, this method is consistent with our previous practice of examining data broken out by geographic area in setting the salary level. The Final Rule methodology also benefits from continuity with our 2004 methodology, in which we set the salary level equal to a percentile of the earnings of full-time salaried workers in the South. Finally, the approach adopted in this Final Rule fulfills the Department's goals of making the salary methodology simpler and more transparent. *See* 80 FR 38527.

The Department believes that the standard salary level set in this Final Rule will appropriately distinguish between those who likely are bona fide EAP employees and those who likely are not, when paired with the current duties test and will not require a return to a limit on the performance of nonexempt work. The Final Rule salary level, like the Department's proposed salary threshold, exceeds the inflation-adjusted 2004 salary level and the levels suggested by the Kantor long test and 2004 methods (all of which were based on the lower long test salary), but is at the low end of the historical range of short test salary levels, based on the historical ratios between the short and long test salary levels. A substantially higher standard salary threshold, such as the levels advocated by some commenters representing employees, would fail to account for the absence of a long test, which historically allowed employers to claim the exemption at a lower salary level for employees who satisfy a more restrictive duties test. This is particularly true given that the salary threshold will apply nationwide, including in low-wage regions and low-wage industries. In the NPRM, the Department considered setting the standard salary equal to the 50th percentile of earnings of full-time salaried workers nationwide ($1,146 per week or $59,592 annually according to the data set used in this Final Rule); we also considered adjusting the 1975 short test salary level of $250 for inflation ($1,100 per week or $57,200 annually). We declined to adopt either alternative, however, due to our belief that the salary level generated through these methods would result in overtime eligibility for too many employees in low-wage regions and industries who are bona fide EAP employees. *See* 80 FR 38534. As discussed above, the Department received a great number of comments in response to the NPRM that confirm our concern about the applicability of such a salary level in low-wage regions and industries. Based on these comments and for the reasons discussed above, the Department has decided to use a regional data set that results in a lower standard salary level than the national data set we proposed in the NPRM.

The Department is mindful that any salary level must adequately demarcate bona fide EAP employees in higher-wage, as well as lower-wage areas. As we have previously explained when discussing the salary level to be paired with the more rigorous long duties test, the threshold "can be of little help in identifying" bona fide EAP employees when "large numbers" of traditionally nonexempt workers in large cities earn more than this amount. Weiss Report at 10. By setting the salary equal to the 40th percentile of salaries in the lowest-wage Census Region, a higher percentile than we chose in 2004, the Department's methodology is sufficiently protective of employees in higher-wage regions and accounts for the fact that the standard salary level will be paired with a less rigorous standard duties test that does not specifically limit the amount of nonexempt work that can be performed. The $913 salary level is within the historical range of short test salary levels, based on the ratios between the short and long test salary levels, albeit at the low end of that range. To the extent that salaries in lower-wage regions have converged with salaries elsewhere in the country, as some commenters suggested, tying the salary level to salaries in the lowest-wage Census Region is even less likely to result in a threshold that is inappropriate for other areas.

The Department believes the Final Rule methodology strikes an appropriate balance between minimizing the risk of employers misclassifying overtime-eligible workers as exempt, while reducing the undue exclusions from exemption of bona fide EAP employees. As the Department explained in the NPRM, we have long recognized that there will always be white collar overtime-eligible employees who are paid above the salary threshold, as well as employees performing EAP duties who are paid below the salary threshold. Under the Final Rule, 5.7 million white collar employees who fail the standard duties test will now also fail the salary level test eliminating their risk of misclassification as exempt. The Department estimates that 732,000 of these white collar salaried workers are overtime-eligible but their employers do not recognize them as such. *See* section VI.C.ii. An additional 4.2 million employees who meet the standard duties test (but may not have met the long duties test prior to 2004) will no longer qualify for the EAP exemption—and therefore will become overtime eligible—because they are paid less than the new salary level. *See* section VI.C.ii. Although the Department recognizes that an estimated 6.5 million white collar employees who fail the standard duties test will still earn at least the new salary level, these overtime-eligible employees will be protected by the application of the duties test.

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[34] The Department does not know which employees work for small businesses and therefore randomly assigns workers to small businesses. The number of likely exempt employees who do not live in metropolitan areas is based on employees who do not live in a Metropolitan Statistical Area.

Other measures confirm the appropriateness of the new standard salary level. The Department has traditionally considered newly hired college graduates to be overtime eligible and the Final Rule salary level is slightly higher than the average salary for college graduates under 25 years old.[35] *See* Weiss Report at 19. Setting the salary level at the 40th percentile of weekly earnings of full-time salaried workers in the South also places it far enough above the minimum wage to provide an effective means of screening out workers who should be overtime protected. Following each update from 1949 to 1975, the ratio of the short test salary level to the earnings of a full-time, nonexempt, minimum wage worker equaled between approximately 3.0 and 6.25.[36] The proposed salary level is 3.15 times full-time minimum wage earnings ($913/($7.25 × 40)), which is within the historical range.

To the extent that some commenters advocated an even further downward adjustment to the salary level to account for low-wage regions and industries, the Department believes that such an adjustment would not be appropriate given that the Department has decided not to introduce a specific limitation on the performance of nonexempt work into the standard duties test. Moreover, we note that the standard salary level must be practicable in high-wage areas as well as in low-wage ones. As we have previously stated, the salary threshold "can be of little help in identifying" bona fide EAP employees when "large numbers" of traditionally nonexempt workers in high wage areas earn in excess of the salary level. Weiss Report at 10. In California and New York, for example, 69 percent of first-line supervisors in construction, 51 percent of paralegals and legal assistants, and 31 percent of secretaries and administrative assistants earn $913 or more per week, despite the fact that the probability of these workers passing the standard duties test is between 0 to 10 percent. With respect to commenters who expressed concern that employees performing the same duties will be exempt in one location and overtime protected in another, the Department notes that this has always been the case and may occur at any salary level. Lowering the salary threshold below the amount set in this Final Rule would result in a salary level that is inappropriate for traditionally nonexempt workers in high wage areas, especially when paired with the less rigorous standard duties test.

The $913 salary level adopted in this Final Rule corresponds to the low end of the historical range of salaries for the short duties test on which the current standard duties test is based ($889 to $1,231). The Department considered the possibility of adopting a salary level equal to the 35th percentile of weekly earnings of full-time salaried employees in the South, which would yield a salary level of $842 per week based on fourth quarter 2015 data. However, given that this would result in a salary level lower than the bottom of the historical range of short test salary levels, based on the historical ratios between the short and long test salary levels, the Department determined that setting the salary level at the 35th percentile of the lowest-wage Census Region would not work effectively with the standard duties test. The Department also considered adopting a higher salary level within the historical range of short test salaries as advocated by many employee representatives, but we remain concerned about the adverse effect such a threshold might have on low-wage regions. Accordingly, the Department has concluded that the 40th percentile of weekly earnings of full-time salaried workers in the South represents the best dividing line between employees who are overtime eligible and those who may not be overtime eligible, when paired with the standard duties test.

Historically the Department has looked to low-wage industries as well as low-wage regions in setting the long test salary and, in 2004, we looked specifically to the retail industry in setting the standard salary level.[37] In developing this Final Rule, the Department examined weekly earnings of full-time salaried employees in the retail and restaurant industries to determine if adjustment based on these industries was appropriate. In the retail industry, the 40th percentile of full-time salaried employees nationally is $848 per week, a salary below the low end of the historical range of the short test salary ($889) and therefore one that would not work effectively with the standard duties test. In the restaurant industry (food services and drinking places), the 40th percentile of full-time salaried employees nationally is $724 per week. This salary is not only below the low end of the historical short test range, but also only slightly above the historical average of the long test salary level ($719).[38] [39] The Department therefore concluded that setting the salary level based on wages in these industries would require significant changes to the standard duties test, which commenters representing employers overwhelmingly opposed, *see, e.g.*, NRF, NRA, FMI, and which would be inconsistent with the Department's goal of simplifying the exemption. The Department believes, moreover, that the lower salary level yielded by using the lowest-wage Census Region is appropriate over the range of industries, including low-wage industries, because it captures differences across regional labor markets without attempting to adjust to specific industry conditions.

With respect to the Chamber's suggestion that the Department limit the data set to the three lowest-wage states in the South (for which the 40th percentile of weekly earnings is $784), this methodology yields a salary level significantly below the historical range of short test salary levels and for all the reasons discussed above would therefore fail to work appropriately with the standard duties test. If the Department had instead looked to Census divisions, the West South Central division,[40] which includes Louisiana and Oklahoma has a 40th percentile of weekly earnings of full-time salaried workers of $878, and the East South Central division,[41] which includes Mississippi, has a 40th percentile of weekly earnings of full-time salaried workers of $849. Both of these would also result in a salary level that is lower than the bottom of the historical short test salary range and would thus necessitate changes to the duties test. Moreover, the Department believes that the best practice is to set the salary level based on an entire region, as we did in 2004, rather than based on a select and very small subset of states or on a Census division.[42] The three Census divisions that make up the South Census Region have lower wages at the 40th percentile of weekly earnings of full-time salaried workers than any other Census divisions. By focusing on the lowest-wage Census Region—made up of the three lowest-wage Census divisions—we have removed the effect of the three higher earnings Census Regions on the salary level, ensuring the salary level is not driven by earnings in high- or even middle-wage regions of the country. Moreover, establishing the salary level based on a Census Region provides a sufficient data set to capture differences across regional labor markets and produces a salary level that is appropriate on a national basis.

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[35] Several commenters asserting that the Department's proposed salary level is too high, including the American Council of Engineering Companies and the American Institute of Certified Public Accountants, suggested that increasing the salary level could lead employers to classify recent college graduates or junior employees as nonexempt. The Department has long recognized that "college graduates just starting on their working careers . . . normally have not achieved bona fide administrative or professional status, nor are their salaries commensurate with those of fully trained and experienced professional or administrative employees." Weiss Report at 19.

[36] The 6.25 ratio is an outlier that was set in December 1949 (when the short test was created) and the minimum wage increased from $.40 to $.75 per hour one month later (which reduced the ratio to 3.33). To return to the 6.25 ratio, the weekly salary level would have to be set at $1,812.50, which is around the 80th percentile of full-time salaried employees nationally.

[37] In the past, salaries in low-wage areas and low-wage industries have been closely aligned, and in 2004 salaries in the South and in the retail industry were similar. *See* 69 FR 22168 ("[T]he lowest 20 percent of full-time salaried employees in the South region earn approximately $450 per week. The lowest 20 percent of full-time salaried employees in the retail industry earn approximately $455 per week."). This historical parity does not exist at the 40th percentile of workers in the restaurant and retail industries, and adjusting the salary level further to account for wages in these industries would require changes to the standard duties test.

[38] The Department calculated the historic average of the long test salary level by averaging the 20 values set for the long test (executive, administrative, and professional) from 1938 to 1975 in 2015 dollars. The historical average salary level for the long test is $719.

[39] The Department notes there are also significant levels of misclassification of overtime-eligible white collar workers as exempt in these industries. *See* section VI.C.ii.

The Department also declines to adopt different salary levels for different regions of the country or for different industries or sizes of businesses. The Department has always maintained a salary level applicable to all areas and industries. As the Department explained when we rejected regional salary thresholds in the 2004 Final Rule, adopting multiple different salary levels is not administratively feasible "because of the large number of different salary levels this would require." 69 FR 22171. Furthermore, as discussed earlier, the Department believes the methodology adopted in this Final Rule will adequately account for commenters' concerns about geographic and other disparities by setting the salary level based on salaries in the lowest-wage Census Region.

In addition to asserting that the proposed salary level is inappropriate for low-wage regions and industries, commenters requesting a lower salary level also criticized the methodology the Department used in our proposal, took issue with the justifications underpinning the proposal, and predicted that the proposed salary level would negatively impact employers and employees. Some commenters criticized the Department for using a different percentile to set the salary threshold than it has in the past. *See, e.g.,* FMI; National Roofing Contractors Association (asserting that the "threshold would extend to the 40th percentile of wage earners, up sharply from methodologies used when previously determining the threshold that used the 10th and 20th percentile").

Several commenters also disagreed with the Department's explanation that it was necessary to set a percentile that would not only reflect increases in nationwide salary levels since 2004, but also correct for the fact that the salary level set in 2004 was too low—when paired with a duties test based on the historical short duties test—to effectively screen out overtime-protected white collar employees from the exemption. Many of these commenters asserted that the Department did account for the elimination of the long duties test, by increasing "the percentile used from 10th to 20th." Littler Mendelson; *see also* AH&LA; NRF. The Chamber commented that the Department did not need to adjust for the elimination of the long duties test in 2004 because the long test salary level was so in need of updating that the long duties test had been effectively inoperative for many years. Finally, some commenters asserted that the Department improperly equates the standard duties test with the less rigorous short duties test. *See, e.g.,* World Floor Covering Association ("DOL did not eliminate the long duty test and keep the short duty test in 2004. Rather, it combined the short and long duties tests by relaxing the strict standards under the long duty test and increasing duties under the short duty test.") The Chamber and the Iowa Association of Business and Industry pointed out that in 2004 the Department added to the standard executive duties test an additional requirement (that the employee be one who has "the authority to hire or fire other employees or whose suggestions and recommendations" as to these matters "are given particular weight"), and the Iowa Association of Business and Industry also noted that the Department added a "matters of significance" qualification to the administrative standard duties test.

The Department disagrees with these comments, and we continue to believe that the salary level set in 2004 was too low to effectively screen out from the exemption overtime-protected white collar employees when paired with the standard duties test. As an initial matter, we disagree with commenters' suggestion that the standard duties test does not closely approximate the historic short duties test because of minor differences between the two tests. In 2004, the Department described these differences as merely "de minimis," and explained that the new standard duties test is "substantially similar" to the old short duties test. 69 FR 22192–93; 69 FR 22214. The key difference between the old short test and the old long test was that the long test imposed a bright-line 20 percent cap on the amount of time an exempt employee could spend on nonexempt duties (40 percent for employees in the retail or service industries). The short duties test, in contrast, did not impose a specific limitation on nonexempt work because the short test was intended to apply only to workers who earned salaries high enough that such a limitation was unnecessary. The standard duties test developed in 2004 takes the short test approach and does not specifically limit nonexempt work.

When moving to a standard duties test based on the short duties test in 2004, the Department relied on the methodology we had historically used to set the long test salary threshold, with two changes. First, the Department set the salary level based on the earnings of exempt *and nonexempt* full-time salaried employees. In previous rulemakings, the Department had looked only at salary data on employees who met the EAP exemption, who earn higher salaries on average than nonexempt salaried employees. *See* 69 FR 22166–67. Second, recognizing that "employees earning a lower salary are more likely non-exempt," the Department offset the first change by making an additional adjustment. *Id.* The 2004 Final Rule set the salary level to exclude from exemption "approximately the lowest *20* percent of *all* salaried employees," whereas previously the Department set the salary level to exclude "approximately the lowest-paid *10* percent of *exempt* salaried employees." 69 FR 22168 (emphases added and in original); 69 FR 22166 (emphases added). By setting the salary threshold at a higher percentile of a data set that included employees likely to earn lower salaries, the Department explained that we reached a final salary level that was "very consistent with past approaches" to setting the long test salary threshold. 69 FR 22167.

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[40] The West South Central division comprises Arkansas, Louisiana, Oklahoma, and Texas.

[41] The East South Central division comprises Alabama, Kentucky, Mississippi, and Tennessee.

[42] A number of commenters noted that the Department's proposal is higher than the minimum salary level necessary for an EAP employee to be exempt from state overtime laws in two high-wage states, California ($41,600 in 2016) and New York ($35,100 in 2016). *See, e.g.,* Corpus Christi Chamber of Commerce; FMI; IFA; Littler Mendelson. The salary thresholds for the white collar exemption in California and New York are based on multipliers of the full-time equivalents of those states' minimum wages; the salary level in California is 2 times the state minimum wage, and the salary level in New York is typically 1.875 times the state minimum wage. *See* Cal. Lab. Code Sec. 515(a); N.Y. Comp. Codes R. & Regs, 12 §§ 142–2.1, 2.14. These multipliers are lower than the historical ratio of the Department's short test salary level and the federal minimum wage (which has never been lower than 2.98, *see* 80 FR 38533), and they approximate the historical ratio between the Department's long test salary level and the federal minimum wage (which, between 1958 and 1975, ranged from 1.85 to 2.38). The Department believes that the salary level yielded by our methodology, which is 3.15 times the current federal minimum wage, better corresponds to the standard duties test, which—like the old short duties test—does not include a quantitative limit on nonexempt work. The Department also notes that California requires exempt EAP employees to spend at least 50 percent of their time performing their primary duty, not counting time during which nonexempt work is performed concurrently. *See* Cal. Lab. Code Sec. 515(a), (e); *see Heyen* v. *Safeway Inc.,* 157 Cal. Rptr. 3d 280, 302 (Cal. Ct. App. 2013).

Although the Department also recognized the need to make an additional adjustment to the long test salary level methodology because of the move to the standard duties test, *see* 69 FR 22167, the salary level included in the 2004 Final Rule ultimately did not do so. The Department indicated that the change in percentile could account for both the fact that the data now "included nonexempt salaried employees" and "the proposed change from the 'short' and 'long' test structure." *Id.; see* 68 FR 15571. At the same time, however, the Department acknowledged that the change to the 20th percentile of exempt and nonexempt salaried employees produced a salary that was in fact roughly equivalent to the salary derived through the methodology previously used to set the long test salary levels. *See* 69 FR 22168. As the data tables in the 2004 Final Rule show, the $455 salary level excluded only 8.2 percent of likely exempt employees in the South and 10.2 percent of likely exempt employees in retail. *See* 69 FR 22169, Table 4; *see also* 69 FR 22168 ("The lowest 10 percent of likely exempt salaried employees in the South earn just over $475 per week.").[43] Accordingly, the Department set the standard salary level using a methodology that yielded a result consistent with the methodology we had historically used to set the salary level paired with the *long* duties test, even though the new standard duties test was based on the *short* duties test. This was a methodological error, even if employers at the time were primarily using the less rigorous short duties test. The fact that the long duties test was unused because the Department had neglected to update the salary associated with it for 29 years does not mean that we did not need to account for the removal of the long test when the standard test was established. The Department is now correcting this error by setting the salary level equivalent to the 40th, rather than the 20th, percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (the South). This percentile results in a salary level that is at the low end of the historical range of short test salary levels, based on the historical ratios between the short and long test salary levels, but is appropriately higher than the historical long test salary levels. By making this change to our 2004 methodology, the Department better accounts for the fact that the standard duties test is significantly less rigorous than the long duties test and, therefore, the salary threshold must play a greater role in protecting overtime-eligible employees.

2. *Purpose of the Salary Level Test*

Several commenters that stated that the Department's proposed threshold is too high asserted that the proposal alters the purpose of the salary test and inappropriately minimizes the role of the duties test by excluding from the exemption too many employees who satisfy the standard duties test. In support of this point, SHRM noted the Department's estimate that 25 percent of white collar workers subject to the salary level test who currently meet the duties test would be overtime-protected under the Department's proposed salary level. HR Policy Association stated that, if the salary level was set according to the Department's proposed methodology, 25 percent of accountants and auditors, 24 percent of business and financial operation managers, and 11 percent of "chief executives" would not qualify for the EAP exemption in 2014.

Several commenters representing employers stated that the salary level has historically been set at a level such that "employees below it would clearly not meet any duties test," or would be very unlikely to satisfy the duties requirements. NRA; *see also* HR Policy Association; Jackson Lewis; SHRM. SHRM and others asserted that the proposal would for the first time set the salary level such that a large number of employees who satisfy the duties test would be excluded from the exemption, which would therefore make them overtime eligible. These commenters pointed to the Department's statement, when setting the long test salary thresholds in 1949 and 1958, that the thresholds should not defeat the exemption for "any substantial number of individuals who could reasonably be classified for purposes of the Act as bona fide executive, administrative, or professional employees," and should provide a "ready method of screening out the obviously exempt employees." Weiss Report at 8–9; Kantor Report at 2–3. Commenters asserted that because only those who are "*very likely* to satisfy" the duties tests earn salaries above the Department's proposed threshold, *see* Jackson Lewis (emphasis in comment), the Department has turned the historical purpose of the salary level "on its head." *See* PPWO. PPWO, SHRM, and others further commented that the Department's proposal improperly renders the duties test superfluous and makes the salary level test the "sole" determinant of exempt status.

The Chamber, FMI, and SHRM also stated that the Department lacks the authority to set wages for, or establish a salary level with the goal of, improving the conditions of executive, administrative, and professional employees. IFA asserted that because the Department's proposal makes nonexempt what IFA characterized as a significant number of employees who would clearly meet the duties test, the proposal "expands the number of employees eligible for overtime beyond what Congress envisioned."

Commenters representing employees, however, disagreed that the purpose of the salary level is to identify employees who are very likely to fail the duties tests. NELA and other commenters asserted that the primary purpose of the salary level is to prevent employers from inappropriately classifying as exempt those who are not "bona fide" executive, administrative, or professional employees. NELA noted that the proposed threshold is lower than the salaries of roughly 41 percent of salaried workers who fail the duties test, according to the NPRM, and AFL–CIO commented that under the proposal, "the percentage of overtime-eligible white collar salaried employees above" the salary level "will still be considerably higher than the percentage of employees below the threshold who meet the duties test." Commenters representing employees also disagreed that the Department's proposal would prevent employers from taking advantage of the exemption for a substantial number of bona fide executive, administrative, or professional employees. For instance, EPI noted that BLS scores occupations by skill, knowledge, and responsibility, and finds an hourly wage of about $24 (or $970 for a 40-hour workweek) is below the salary level associated with supervisory responsibilities.

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[43] While the 2004 method and the Kantor long test method produced similar salaries in 2004, the salary levels yielded by these methods now diverge significantly. Today, the 2004 method would produce a salary level of $596 per week, while using the Kantor long test method would result in a salary level of $684 per week. *See* section VI.C.iii. Thus, not only would using the 2004 methodology today fail to account for elimination of the long duties test, it would result in a noticeably lower salary level than the average long test salary level between 1940 and 2004 in 2015 dollars.

As the Department explained in the NPRM, the purpose of the salary level test has always been to "distinguish bona fide executive, administrative, and professional employees from those who were not intended by Congress to come within these exempt categories." 80 FR 38524. Any increase in the salary level must therefore "have as its primary objective the drawing of a line separating exempt from nonexempt employees." *Id.* The salary methodology established in this Final Rule fulfills this purpose by effectively and efficiently demarcating between white collar employees who are overtime protected and those who may be bona fide EAP employees.

The Department does not believe that the methodology adopted in this Final Rule would defeat the exemption for too many employees who pass the standard duties test, or render the standard duties test superfluous. There will always be some employees performing EAP duties who are paid below the salary threshold, as well as overtime-eligible employees who are paid above the salary threshold (and thus whose status turns on the application of the duties test). *See* 80 FR 38527. Under the Final Rule, 6.5 million white collar workers who earn above the required salary level do not satisfy the standard duties test, representing 47 percent of the total number of white collar workers who fail the duties test. For these overtime-eligible salaried workers, the standard duties test rather than the salary test will dictate their exemption status. For example, 48 percent of secretaries and administrative assistants in banking nationwide earn at or above the $913 per week salary level adopted in this Final Rule, although at most 10 percent of such workers are likely to pass the standard duties test. Likewise, 71 percent of first-line supervisors of mechanics, installers, and repairers in the utilities industry nationwide earn at least $913 per week, even though only 10 to 50 percent of such workers are likely to pass the standard duties test.

By contrast, of salaried white collar workers who currently meet the standard duties test, 5.0 million (22.0 percent) earn less than $913 per week, and will thus be eligible for overtime under this Final Rule. Whenever the Department increases the salary level, it is inevitable that "some employees who have been classified as exempt under the present salary tests will no longer be within the exemption under any new tests adopted." Kantor Report at 5. As we have explained, such employees include "some whose status in management or the professions is questionable in view of their low salaries," and some "whose exempt status, on the basis of their duties and responsibilities, is questionable." *Id.* Moreover, as we have long been aware, if too low a salary level is paired with a duties test that does not specifically limit nonexempt work, employers may inappropriately classify as exempt workers who perform large amounts of nonexempt work. *See* 40 FR 7092. The Department believes that many of the workers who will no longer be exempt as a result of this rulemaking would have failed the long duties test and are currently inappropriately classified because of the mismatch between the current standard duties test and the standard salary level. To the extent that commenters expressed concerns that the proposal would exclude from exemption too many bona fide EAP employees in certain areas and industries, the Department has recalibrated the methodology in this Final Rule to better take into account salaries in low-wage regions and industries, as discussed earlier, while remaining cognizant of the corresponding but opposite impact on high-wage regions and industries. *See* section VI.C.ii.

Commenters asserting that the Department's proposal turned the purpose of the salary level test "on its head" misconstrue the relationship between the salary level test and the duties test as it has existed throughout most of the history of the part 541 regulations. The fact that an employee satisfies the duties test, especially the more lenient standard duties test, does not alone indicate that he or she is a bona fide executive, administrative, or professional employee. The salary level test and duties test have always worked in tandem to distinguish those who Congress intended the FLSA to protect from those who are "bona fide" EAP employees. The Department has long recognized, moreover, that "salary is the best single indicator of the degree of importance involved in a particular employee's job," Weiss Report at 9, and "the best single test of the employer's good faith in characterizing the employment as of a professional nature." Stein Report at 42. Thus, the Department acknowledged shortly after we first promulgated the part 541 regulations that, in the absence of a clause "barring an employee from the exemption if he performs a substantial amount of nonexempt work," it becomes "all the more important" to set the salary level "high enough to prevent abuse." Stein Report at 26. This inverse correlation between the salary level and the duties requirements was the basis of the separate short and long tests, which co-existed until 2004.

As reflected in many comments favoring a lower salary level, the Department historically paired the long duties test—which limited that amount of nonexempt work an exempt employee could perform—with a salary level designed to minimize the number of employees satisfying that test who would be deemed overtime-eligible based on their salaries. Even then, the Department noted that the long test salary level should exclude the "great bulk" of nonexempt employees from the EAP exemption. Weiss Report at 18. When the Department enacted the short test in 1949, however, we recognized that this more permissive "short-cut test" for determining exempt status—which did not specifically limit the amount of time an exempt employee could spend on nonexempt duties—must be paired with a "considerably higher" salary level. *Id.* at 23. This salary level, the Department explained, "must be high enough" to qualify for the EAP exemption "only those persons about whose exemption there is normally no question." *Id.* Accordingly, the Department set the short test threshold such that those who earned above this level would meet the requirements of the long duties test—including the limit on performing nonexempt work—"with only minor or insignificant exceptions." *Id.* In other words, the short test salary threshold was sufficiently high that an employee earning above this level was not only "very likely," but nearly certain, to satisfy the long duties test, as well as the short duties test. Between 1949 and 1975, the Department adhered to these principles by enacting short test salary levels at approximately 130 to 180 percent of the long test salary levels.

The standard duties test adopted in 2004, and unchanged by this Final Rule, is essentially the same as the old short duties test. It does not specifically limit the amount of time an exempt employee can spend performing nonexempt duties. Accordingly, the Department disagrees with commenters that suggest that the current duties test can be paired appropriately with a salary level derived from the same methodology we have historically used to set the salary level paired with the long duties test. The Department also disagrees, however, with commenters that suggest the current standard duties test could be paired with a salary level derived from the 50th percentile of full-time salaried workers or from the 1975 short test salary level without also reinstating a lower-salaried long test. The methodology adopted in this Final Rule results in a salary level that is higher than indicated by historical long test methodologies, but at the low end of the historical salary range of short test salary levels, based on the ratios between the short and long test salary levels. The Department believes that this approach strikes an appropriate balance between protecting overtime-eligible workers and reducing undue exclusions from exemption of bona fide EAP employees. It also does so without necessitating a return to the two-test structure or imposing a quantitative limit on nonexempt work—alternatives that many of these same commenters strenuously opposed. *See* section IV.F.

3. Data Used To Set the Standard Salary Level

Some commenters representing employers also raised concerns about the Department's use of the CPS data on full-time nonhourly employees. The Chamber and Fisher & Phillips advocated that rather than calculate the salary level using the CPS data, the Department should create our own data set of exempt salaried employees drawn from WHD investigations and field research. NAM stated that the CPS data provides an "apples-to-oranges" comparison because it reflects all nonhourly compensation, while the Department's proposal excludes certain forms of compensation (for example, some incentive pay) from counting toward the salary threshold, and other commenters made similar assertions. The Chamber, Fisher & Phillips, and the Iowa Association of Business and Industry (IABI) also disagreed with the Department's conclusion that CPS data on compensation paid to nonhourly workers is an appropriate proxy for compensation paid to salaried workers. Employees sampled might be paid on a piece-rate or commission basis, for example, and thus, the Chamber stated, the "non-hourly worker category is at best a rough and imprecise measure of workers paid on the basis required for exempt status." In addition, IABI, the International Foodservice Distributors Association, and others criticized the Department for declining to further restrict the CPS sample by filtering out various categories of employees—such as teachers, lawyers, or federal employees—based on statutory and regulatory exclusions from FLSA coverage or the salary requirement.

The Department continues to believe, as we did in 2004, that CPS data is the best available data for setting the salary threshold. The CPS is a large, statistically robust survey jointly administered by the Census Bureau and BLS, and it is widely used and cited by industry analysts. It surveys 60,000 households a month, covering a nationally representative sample of workers, industries, and geographic areas and includes a breadth of detail (*e.g.,* occupation classifications, salary, hours worked, and industry). As the Department explained in the NPRM, the CPS offers substantial advantage over data drawn from the pool of our own investigations, because the Department's investigations contain too few observations to yield statistically meaningful results. *See* 80 FR 38528.

The Department considers CPS data representing compensation paid to nonhourly workers to be an appropriate proxy for compensation paid to salaried workers, as we explained in the NPRM. *See* 80 FR 38517 n.1. The Department believes that most nonhourly workers are likely to be paid a salary, and although the data may include earnings of workers paid on a fee basis, the EAP exemption can apply to bona fide administrative and professional employees compensated in this manner. *See* § 541.605. Moreover, as explained in greater detail in section IV.C., the Department has adopted a change to the salary basis test in this Final Rule which will newly allow employers to satisfy as much as 10 percent of the standard salary level requirement through the payment of nondiscretionary bonuses and incentive pay (including commissions). The Department acknowledges that the CPS data set may include some compensation excluded from the salary test; however, we are not aware of any statistically robust source that more closely reflects salary as defined in our regulations, and the commenters did not identify any such source.

Finally, the Department disagrees that we should have excluded the salaries of employees in various job categories, such as teachers, doctors, and lawyers, because they are not subject to the part 541 salary level test. These white collar professionals are part of the universe of executive, administrative, and professional employees who Congress intended to exempt from the FLSA's minimum wage and overtime requirements. Including them in the data set achieves a sample that is more representative of EAP salary levels throughout the economy. Moving to an even more standardized sample that does not require adjustments also serves the Department's goal of making the salary methodology as transparent, accessible, and as easily replicated as possible, and is consistent with the President's directive to simplify the part 541 regulations.

4. Comments Requesting a Phase-In of the Proposed Increase

Many employers and commenters representing them also expressed concern about the magnitude of the Department's proposed increase from the 2004 salary level. Under the proposal, the salary level would have increased from $455 a week to $972 per week based on fourth quarter 2015 data, a 113.6 percent overall increase and 9.5 percent average per year increase. Under the Final Rule, the salary level will increase to $913 per week, a 100.7 percent overall increase and 8.4 percent average per year increase. Several commenters, including the Chamber, Littler Mendelson, and NAHB, described the proposed percentage increase in the salary level as "unprecedented." Many commenters urged the Department to gradually phase-in an increase to the salary level. SHRM, for example, stated that a phased-in approach will provide some flexibility to employers, allowing them to gather information about the hours that currently nonexempt employees work and to budget for any increased wages and other costs. Independent Sector noted that an appropriate phase-in period would allow non-profit organizations to adjust to a new salary level without reducing programs and services. Some commenters advocating an incremental approach, such as PPWO and the Chamber, opposed the proposed salary level, but requested a gradual phase-in if the Department moves forward with the proposal. Others did not oppose the Department's proposed threshold, so long as the Department phases in the increase. *See, e.g.,* National League of Cities; the Northeastern Retail Lumber Association; United Community Ministries; Walmart; Washington Metro Area Transit Authority (WMATA).

Contrary to some commenters' assertions, the magnitude of the salary increase proposed by the Department is not unprecedented. The 2004 Final Rule increased the then-current long test salary level for executive and administrative employees by 193.5 percent (from $155 to $455), and increased the then-current short test salary level by 82 percent (from $250 to $455). *See* 69 FR 22123 (explaining that the final rule nearly "triples" the "minimum salary required for exemption"). Further, as EPI pointed out in its comment, in the approximately 11 years between 1938 and 1949, the administrative long test salary test increased 150 percent. The Department acknowledges that this rulemaking enacts a sizeable increase to the 2004 salary level; however, such an increase is necessary in order to reflect increases in actual salary levels nationwide since 2004 *and* correct the 2004 Final Rule's mismatch between the standard duties test and the standard salary level based on the long duties test level. As we explained in the NPRM, this is the first time that the Department has needed to correct for an incongruity between the existing salary level and the applicable duties test. That said, under our proposal, the salary level effective in 2016 would have been $50,544; under the Final Rule, we project that the salary level will not reach $50,000 until the first update on January 1, 2020. Additionally, as explained in section II.G., this Final Rule has a delayed effective date of December 1, 2016— more than the 120-day delayed effective date following publication of the 2004 Final Rule. The Department believes that the timing of the effective date of this Final Rule will help minimize disruption as employers adjust to the new salary level.

5. Impacts of the Increased Salary Level

Commenters identified many impacts that they believed would flow from the proposed increase in the standard salary level. Commenters representing employers and employees differed dramatically on some of the predicted impacts of the rule. In addition, where commenters representing employers and employees agreed on likely outcomes, they viewed the advantages and disadvantages of those outcomes quite differently.

Many employers and their representatives stated that employers would not be able to afford to increase the salaries of most of their currently exempt employees to the proposed level. Therefore, they stated that they were likely to reclassify many of these employees to overtime-protected status, which they asserted would disadvantage the employees in a number of ways and would not increase their total compensation. In contrast, employee advocates predicted that workers will benefit from the increased salary level; those who receive a salary increase to remain exempt will benefit directly, and those who are reclassified as overtime eligible will benefit in other ways, as detailed below.

Employers and their representatives, including AH&LA, CUPA–HR, NAM, NRF, and the National Small Business Association (NSBA), suggested that they would reclassify many employees to overtime-protected status. For example, the NGA surveyed its members, and 98 percent stated they would reclassify some currently exempt workers, and 80 percent stated that they would reclassify 50 percent or more because they cannot afford to increase their salaries. NCCR commented that one restaurant chain stated it likely would reclassify 90 percent of its managers and another company with more than 250 table service restaurants estimated that 85 percent of its managers have base salaries below the proposed threshold. CUPA–HR stated that 87 percent of those responding to its survey of higher education human resource professionals stated "they would have to reclassify *any* exempt employee currently making less than $47,500" (emphasis in comment).

Many employers and their representatives stated that they would convert newly nonexempt employees to hourly pay and pay them an hourly rate that would result in employees working the same number of hours and earning the same amount of pay as before, even after accounting for overtime premium pay. Also, some employers indicated they might reduce their workers' hours, especially over time, in an attempt to avoid paying any overtime premium pay, so the formerly exempt workers' hours and pay ultimately could be lower. *See, e.g.,* AH&LA; CUPA–HR; Jackson Lewis; NAM; NRF; NSBA.

Some commenters gave specific estimates of the percentage of newly nonexempt employees who would have their overtime hours limited. Associated General Contractors of America (AGC) surveyed its construction contractor members and more than 60 percent expected to institute policies and practices to ensure that newly overtime-eligible employees do not work more than 40 hours per week. ANCOR surveyed service provider organizations and more than 70 percent stated that they would prohibit or significantly restrict overtime hours. SHRM similarly commented that 70 percent of its survey respondents stated they would implement restrictive overtime policies. NRF cited an Oxford Economics report and stated that 463,000 retail workers would be reclassified to nonexempt status and those employees who work overtime would be converted to hourly pay, with their earnings remaining the same after their hourly rates of pay were adjusted, while an additional 231,500 retail employees would be reclassified to nonexempt status and have their hours and earnings reduced.[44]

Not all employers indicated such high numbers of employees would be reclassified, converted to hourly pay, or limited in hours. For example, NAM stated that 41 percent of manufacturers stated they would reclassify employees and 37.2 percent stated they would then reduce employees' hours. NAHB stated that 33 percent of survey respondents indicated they would need to make some change regarding construction supervisors, and 56 percent of that subgroup indicated they would take steps to minimize their overtime. However, only 13 percent of respondents stated they would reduce salary, and only 13 percent stated they would switch employees from a salary to an hourly rate.

Numerous employers and their representatives, including AH&LA, CUPA–HR, NCCR, Nebraska Furniture Mart, NRA, NRF, OneTouchPoint, Pizza Properties, Seyfarth Shaw, SHRM, SIFMA, and the Salvation Army, also commented that the employees who were reclassified to nonexempt status would be further disadvantaged because they would lose valuable fringe benefits, such as life insurance, long-term disability insurance, increased vacation time, incentive compensation, tuition reimbursement, and increased retirement contributions. They noted that many employers offer such benefits only to exempt employees, or provide them to exempt employees at a greater rate or at a reduced cost. In addition, ANCOR and others stated that nonexempt workers' fringe benefits would be negatively affected because employers would take funds away from such benefits in order to pay for the increased costs of the rule. AGC surveyed its construction contractor members, and 40 percent expected affected employees to lose some fringe benefits. With regard to those employees who remain exempt and receive a higher salary, some employer representatives, including AH&LA, NCCR, and NRF, stated that the employees would not actually benefit because employers would make other changes, such as reducing or eliminating bonuses or other incentive compensation, in order to keep their total labor costs the same. These commenters viewed this as problematic because these employees are in middle management positions that are "key steps on the ladder of professional success" and incentive compensation is an important motivator. AH&LA stated that reducing incentive compensation "curtails the ability of employers to reward their star employees," although they acknowledged that this concern would be mitigated if incentive compensation could count toward the increased salary level. NAHB's survey results showed that 55 percent of those employers who indicated that some change for construction supervisors would be necessary would reduce or eliminate bonuses, while 33 percent stated they would reduce or eliminate other benefits.

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[44] NRF commissioned Oxford Economics to examine the impact of the Department's rulemaking on the retail and restaurant industries and attached three documents produced by the firm to its comments on the NPRM. The first document is a report titled "Rethinking Overtime—How Increasing Overtime Will Affect the Retail and Restaurant Industries" and was published before the Department issued the NPRM. The second document is a letter dated July 17, 2015 that updates the estimates provided in the "Rethinking Overtime" paper in light of the Department's proposal. The third document is a letter dated August 18, 2015 that examines states' prevailing wage levels and the Department's automatic updating proposal.

Employer groups also stated that employees reclassified to nonexempt status and converted to hourly pay would be harmed by the loss of flexibility and the loss of the guarantee of receiving the same salary every workweek. Employers and their representatives, including AH&LA, American Bankers Association (ABA), the Chamber, FMI, IFA, New Jersey Association of Mental Health and Addiction Agencies, OneTouchPoint, PPWO, SIFMA, Seyfarth Shaw, and SHRM, asserted that exempt status gives employees the flexibility to come in late, leave early, and respond to unexpected events such as taking a sick child to the doctor. Moreover, they can do so without fear of losing pay for the time spent away from work. Newly overtime-eligible employees, these commenters asserted, will have to account for their time and they will have to think more carefully about taking unpaid time off to deal with personal and family issues. Employer representatives noted that another benefit of exempt status is that many employers allow exempt employees to perform some of their work remotely and outside of normal business hours, such as from home during the evening, as best suits the employees' personal schedules. *See, e.g.*, AH&LA; American Staffing Association; CUPA–HR; HR Policy Association; Jackson Lewis; Maryland Chamber of Commerce; SIFMA; Women Impacting Public Policy (WIPP); YMCA. Commenters stated that many employers do not allow nonexempt employees this same flexibility in work location and in the ability to work during non-traditional hours, as it is more difficult to monitor their hours and ensure proper compensation for all hours worked. For example, SHRM stated that 67 percent of its survey respondents indicated decreased workplace flexibility and autonomy were likely results of the Department's proposal.

Employer groups also stated that employees reclassified to nonexempt status will lose out on after-hours management training programs and committee meetings and thus have fewer opportunities for career advancement. *See, e.g.*, AH&LA; ANCOR; Construction Industry Round Table; Credit Union National Association; CUPA–HR; Jackson Lewis; Kentucky Pharmacists Association; Maryland Chamber of Commerce; NCCR; NRF; New York State Restaurant Association; PPWO; SIFMA; SHRM. Many of these commenters also stated that newly overtime-protected workers will not be permitted to work extra hours to get the job done as a way to prove their talents and dedication, and they will not be asked to perform the most challenging and important managerial functions. Employers asserted that these changes will "hollow out" the ranks of middle management, limit existing career paths, and negatively affect the newly nonexempt employees' promotion potential and future earnings. *See, e.g.*, Michigan Chamber of Commerce; NCCR; NRF.

Many employers and their representatives also emphasized that the loss of exempt status will have a negative impact on employee morale. They stated that employees sought out their management role and view their exempt status as an indication of the employer's recognition of their achievements and their position as part of the management team. They stated that the loss of exempt status will be perceived as a demotion and devaluation of their roles in the organization, even if other aspects of their compensation remain the same. *See, e.g.*, ANCOR; Chamber; CUPA–HR; FMI; Jackson Lewis; NAM; NCCR; NGA; NRA; Pizza Properties; SIFMA; SHRM; Salvation Army. NRF cited a survey it commissioned of 200 salaried retail and restaurant managers showing that the change in status would make 45 percent of managers feel like they were "performing a job instead of pursuing a career," and 31 percent would feel limited in their ability to advance in their careers.

Finally, employer representatives identified a number of other negative consequences that they believed would flow from the adoption of the proposed increase in the standard salary level. For example, some employer groups, including FMI, NRF, and WIPP, emphasized that they believed employers would eliminate full-time jobs and create part-time jobs. FMI, NGA, Seyfarth Shaw, and SHRM indicated that employers would use part-time workers to ensure that newly overtime-eligible employees did not have to work overtime hours. ANCOR, NGA, Seyfarth Shaw, and the YMCA also predicted that, as the hours of the newly nonexempt workers are restricted, employers will respond by increasing the workload burden and scope of responsibility of the managers and supervisors who remain exempt.

Employees and employee advocates, on the other hand, predicted that workers would benefit in a variety of ways from the proposed increase in the standard salary level. First, they saw direct benefits from the proposed salary because, for those who remain exempt but currently earn less than the proposed increase, they will receive additional pay each week in order to raise them to the new salary level. Employees who are reclassified to nonexempt status will get more time outside of work to spend with their families or to engage in leisure activities if their hours are reduced, and thus they will have a better work-life balance; alternatively, they will be paid time-and-a-half for any overtime hours they work. Finally, work opportunities will be spread as workers who had been unemployed or underemployed will gain additional hours. Employee advocates viewed these outcomes as consistent with the fundamental purpose of the FLSA's overtime provision. *See, e.g.*, AFL–CIO; American Federation of Teachers (AFT); Legal Aid Society-Employment Law Center (ELC); National Women's Law Center (NWLC); Partnership.

Some advocates, including AFL–CIO, AFT, and NELP, emphasized the benefits of spreading employment in light of the harms that come from working long hours, citing studies showing that long hours are related to stress and injuries at the workplace and increased incidences of certain chronic diseases like heart disease, diabetes, and depression. They also cited studies showing the high cost to businesses associated with absenteeism and turnover due to workplace stress and stated that productivity would improve by reducing turnover. The AFT noted that if employers cut formerly exempt workers' hours and add more nonexempt jobs, that would "likely have a salutary effect on wages since the low wage growth in our economy is related to employment slack."

EPI disputed the employers' claim that wages and hours would remain the same after employees were reclassified to nonexempt status. EPI emphasized that this view assumes that employees have no bargaining power. However, EPI stated that a "consistent finding of both labor and macroeconomics is that nominal wages are 'sticky,' meaning that employers rarely will lower them." EPI concluded this is particularly likely to be the case now, given that the unemployment rate for college graduates was just 2.6 percent in July 2015 and for those in "management, professional, and related" occupations was just 3.1 percent. Therefore, employers will not be able to reduce employees' wage rates when they are reclassified to nonexempt status to the full extent that would be necessary for the employees to receive no additional compensation for overtime hours worked. NELP similarly emphasized that, at a time when even low-wage employers are raising their starting wages in order to attract and retain a qualified workforce, it would be "a foolhardy business practice" for employers to risk losing formerly exempt workers by decreasing their wages and hours.

Worker advocates also disputed employers' claims that workers would lose privileges and flexibility after they were converted. For example, EPI pointed to research based on the General Social Survey showing that salaried workers and hourly workers experience similarly limited workplace flexibility at levels below $50,000 per year. The research showed that 43–44 percent of hourly workers paid between $22,500 and $49,999 were able to "sometimes" or "often" change their starting or quitting times. That percentage only increased to 53–55 percent for salaried workers in that same range. Only when salaries rose above $60,000 did 80 percent of salaried workers report being able to "sometimes" or "often" change their starting or quitting times. Employees paid hourly actually reported more flexibility in the ability to take time off during the work day to take care of personal matters or family members, with 41 percent of hourly workers earning $40,000–$49,999 stating it was "not at all hard" compared to only 34 percent of salaried workers. Finally, salaried workers reported slightly greater levels of work stress than hourly workers, and they worked mandatory overtime at the same frequency as hourly workers and more days of overtime in general.

Many of the comments from individual exempt employees similarly emphasized their lack of flexibility. For example, a retail store manager described working 55–60 hours a week, with store staffing kept at the bare minimum of two-person coverage. Therefore, the manager has little "flexibility when an employee calls out sick. I have to pick up the slack." A chef similarly stated that he routinely works 20–30 hours of overtime per week, and has to modify his schedule to meet the demands of the business, including by filling in if an overtime-eligible cook gets sick. Another exempt employee who reported working 1136 hours of overtime in three years (an average of approximately 49 hours of work per week) stated, "[i]f I complete my work in 30 hours I still have to stay for the required work hours of the company & longer as required or requested." A manager of a community home for the intellectually disabled concurred, stating that the homes "have to be staffed 24 hours a day, 365 day[s] per year. To reduce[ ] organizational overtime, managers are expected to work when employees call in sick, are on leave, and when a client is in the hospital and needs a 24 hour sitter. Managers also pitch in to help other homes when there is a need." Other exempt workers similarly noted that they are scheduled to staff specific shifts and also are required to fill in for hourly workers who call out sick, when positions are vacant, when extra hours are needed such as around the holidays, or when the employer has to cut payroll to meet its targets.

With regard to the loss of "status," NELP commented that, even if employers do reclassify some employees to nonexempt status, there is no reason to consider that a demotion. NELP stated the employer can continue to give nonexempt employees whatever job titles are appropriate and is not required to otherwise diminish their stature. SEIU emphasized that it is not the designation of "exempt" that provides status to workers, but rather the pay and benefits that should accompany that designation. For example, most registered nurses, who perform bona fide professional duties and whose earnings typically exceed the proposed salary, nonetheless prefer to be paid hourly and be overtime eligible. SEIU concluded that "[b]eing classified as ineligible for overtime is little comfort to a worker who routinely works more than forty hours a week and can barely afford child care for the time she is missing with her family." The UAW, representing postdoctoral scholars, made the same point regarding status, concluding that "their low pay indicates that their employers do not view them or treat them as bona fide professionals."

Numerous individual employees also stated that they would not perceive a change from exempt to overtime-protected status as a demotion. For example, one employee stated that he sometimes works seven days and more than 55 hours per week, and that he would "gladly move down to non-exempt and punch a time card. At least I would finally be paid fairly for all the hours I am putting in." A retail store manager similarly stated that he works an average of 55–60 hours per week and looks forward to either receiving an increased salary or the return of his personal life. He rejected the view that exempt employees would feel demoted by a change in status, saying he does not want a meaningless title and would not "be embarrassed if my employees find out I've been bumped to hourly again." Another store manager with 12 years of experience emphasized "I am NOT concerned with the transition from being exempt to non exempt if that were to happen." A convenience store manager who works an average of 60–65 hours per week stated that 7 of the 8 exempt employees he knows quit in the past year due to being overworked without any additional compensation, and he stated that workers feel that an exempt position is "a demotion rather than a promotion." Another exempt employee stated that he believes that businesses often use salaried positions as a way to cut down on overtime costs, and that the employers "who are bemoaning the loss of 'status' for their employees are probably those who have used this trick to get more hours worked for less money."

In response to some employers' assertions that they will reclassify many of their currently exempt employees to overtime-protected status, convert them to hourly pay, modify their pay so that they work the same number of hours and earn the same amount, and potentially reduce their hours in the long run, the Department estimates that 60.4 percent[45] of exempt affected

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[45] The Department stated in the NPRM that 74.7 percent of all affected workers were Type 1 workers who did not regularly work overtime and did not work overtime in the survey week; therefore, we assumed they would not be paid an overtime premium despite becoming overtime protected. *See* 80 FR 38574. However, as explained in section

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employees do not currently work any overtime hours. As explained in detail in the economic impact analysis in section VI.D.iv., we expect there to be relatively little change in the weekly earnings or weekly hours of such employees. We agree that for the remaining employees, who do regularly or occasionally work overtime hours, the impact of the rule will depend upon how their employers choose to respond, and we recognize there likely will be a variety of responses from which employers can choose. For example, employers will raise the salaries of some employees to the new required level; employers will reclassify some other employees to nonexempt status and provide minimum wage and overtime protections and may attempt to minimize the overall cost by modifying those employees' regular rates of pay and reducing their hours. The economic impact analysis discusses the range of possible outcomes. However, as explained in section VI.D.iv., based upon our review of the economic literature, the Department concludes that the most likely outcome is that affected workers who work overtime hours and who are reclassified to overtime-protected status on average will receive increased earnings, because employers will not be able to fully adjust their regular rate of pay to the extent necessary to provide only the same level of earnings. As further explained in the economic impact analysis, workers whose exemption status changes also will see their work hours decrease on average, and the extra hours will be spread among other workers.[46] The Department views these outcomes as fully consistent with the dual purposes of the FLSA's overtime requirement: (1) Spreading employment by incentivizing employers to hire additional employees, but rewarding those employees who are required to work overtime with time-and-a-half pay for overtime hours; and (2) avoiding detrimental effects on the health and well-being of employees by minimizing excessive working hours.

The Department recognizes that these outcomes are averages and some employees ultimately may receive lower earnings if their employers reduce their hours more extensively in an effort to ensure that no overtime hours are worked. However, such employees will receive extra time off. Therefore, the Department partially concurs with the comments of the individual employees and employee advocates who stated that the overall impact of the rule would benefit employees in a variety of ways, whether through an increased salary, overtime earnings when they have to work extra hours, time off, and/or additional hours of work for those who were previously unemployed or underemployed.

Some employers also asserted that employees reclassified as nonexempt would lose fringe benefits such as life insurance, disability insurance, increased vacation time, and bonuses and other incentive compensation that they provide only to exempt employees. The Department notes that employers may choose to continue to provide such benefits to workers who employers like ABA and IFA described as "critically important"; the design and scope of such fringe benefit and incentive compensation programs are within the employers' control. We see no compelling reason why employers cannot redesign their compensation plans to provide such fringe benefits and bonus payments based upon, for example, the employees' job titles rather than based upon their exemption status.[47]

With regard to the employer claim that employees reclassified to overtime-protected status would lose flexibility in their schedule or the ability to take a few hours off when needed for personal purposes, the Department notes that the employees who are affected by this Final Rule currently earn a salary between $455 per week and $913 per week (or between $23,660 and $47,476 per year). The results of the General Social Survey[48] research discussed in the EPI comment indicate that hourly-paid workers and salaried workers earning between $22,500 and $49,999 have little difference in workplace flexibility with regard to an employee's ability to modify his or her starting time or quitting time; a substantial increase in such flexibility is not seen until workers earn above $60,000. Moreover, workers paid hourly who earn between $40,000 and $49,999 actually reported more flexibility to take time off during the day than salaried workers in that pay range. Many of the comments the Department received from individual exempt employees similarly reflected a lack of current flexibility, with employees indicating they were routinely scheduled to work well in excess of 40 hours per week and also had to fill in for other employees who were out sick or on vacation or when positions were unfilled. Therefore, the Department does not believe that workers will incur the significant change in flexibility that some employers envisioned if the employer reclassifies them as nonexempt.

Employers also asserted that employees whose exemption status changes would lose the ability to work from home and outside of normal business hours, and they would lose the ability to attend after-hours training opportunities and meetings or to stay late to "get the job done." The Department understands employers' concerns regarding the need to control and keep accurate records of the work hours of overtime-eligible employees.[49] However, this Final Rule does not prohibit employers from continuing to allow such employees flexibility in the time and location where they work; most employees affected by this Final Rule are employees who employers now trust to exercise discretion and independent judgment with respect to matters of significance on behalf of the company or to supervise other employees and play a role in hiring, firing, and promoting other employees. Employers should be able to trust such valued employees to follow the employers' instructions regarding when, where, and for how many hours they may work and to accurately record their hours worked.[50] Moreover, as noted

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VI.D.iv., in response to comments that the Department underestimated the number of affected workers who work overtime, the Department has now classified a share of workers who reported they do not usually work overtime, and did not work overtime in the reference week (previously identified as Type 1 workers) as Type 2 workers who work occasional overtime. Accordingly, we now estimate that 60.4 percent of affected workers will not receive any overtime premium.

[46] Not all employers will choose to cover the additional hours by hiring new employees. Employers will balance the benefits of the additional hours of work against the costs of hiring workers for those hours. In some cases, this will result in hiring new workers; in other cases, employers will have incumbent workers provide those additional hours.

[47] Where nondiscretionary bonuses or incentive payments are made to nonexempt employees, the payments must be included in the regular rate when calculating overtime pay. The Department's regulations at §§ 778.208–.210 explain how to include such payments in the regular rate calculation. One way to calculate and pay such bonuses is as a percentage of the employee's total earnings. Under this method, the payment of the bonus includes the simultaneous payment of overtime due on the bonus payment. *See* § 778.210.

[48] The General Social Survey, which started in 1972, is the largest project funded by the Sociology Program of the National Science Foundation. Except for the U.S. Census, it is the most frequently analyzed source of information in the social sciences. *See http://www3.norc.org/GSS+Website/About+GSS/.*

[49] The Department included in the fall 2015 Regulatory Agenda our intent to publish a Request for Information seeking information from stakeholders on the use of electronic devices by overtime-protected employees outside of scheduled work hours.

[50] The Department notes that there is no particular order or form of records required. *See* 29 CFR 516.1(a). Employers may choose whatever form

above, an estimated 60.4 percent of employees affected by this Final Rule do not work overtime hours now; the Department believes that any changes for this substantial portion of affected workers will be minimal. Further, the Department notes that most employers currently have both exempt and nonexempt workers and therefore have systems already in place for employers to track hours. Nonetheless, for those employees who do work overtime and who become overtime eligible, the employers will have to evaluate, for example, whether training and other activities that currently occur outside the normal work day, and for which employees currently receive no extra pay, should be moved to within the normal work day or whether they are important enough to warrant payment for any extra hours worked. However, because the Department has concluded that white collar employees earning a salary of less than $913 per week are not bona fide EAP workers, the Department concludes that if the employees perform extra work to "get the job done" they should be paid for all such time.

Regarding the employer assertion that the change in exemption status will harm employees because they will not be able to take time off without losing pay for the time away from work, the Department notes that employers are not required to change employees' pay basis from salaried to hourly simply because they are no longer exempt. Employers may continue to pay employees a salary, even when the employees are entitled to overtime pay if they work in excess of 40 hours per week. *See* §§ 778.113–.114. Moreover, even if newly overtime-eligible employees are converted to hourly status, employers are not required to dock such employees for the hours they take off. Therefore, employers have the authority to determine how to structure the pay plans of the newly overtime-eligible employees, and employers need not structure their pay plans in a manner that results in the potentially adverse effects that the employers identified.

Finally, employers asserted that the loss of exempt status would have a negative impact on employees' morale. However, the Department believes that for most employees their feelings of importance and worth come not from their FLSA exemption status but from the increased pay, flexibility and fringe benefits that traditionally have accompanied exempt status, as well as from the job responsibilities they are assigned. None of these are incompatible with overtime protection. Many exempt employee commenters expressed significant concern and low morale regarding their current situation, and they looked forward to an improved situation under the new rule. Given the employers' emphasis on the important roles that these employees play in the success of their organizations, the Department anticipates that employers will strive to adapt to this rule in a way that minimizes the financial impact on their business while providing the maximum benefits, flexibility, and opportunities to their employees. If employers make these changes in a way that communicates the value they continue to place on the contributions of newly overtime-eligible workers, we are confident that employers can prevent employees from seeing their new entitlement to overtime protection as a demotion.

6. Impacts on Litigation

The Department also received several comments predicting the impact increasing the salary level would have on litigation. Commenters representing employees, such as the International Association of Fire Fighters (IAFF), stated that increasing the threshold would more clearly demarcate between employees who are entitled to overtime and those who are not, decreasing misclassification, and therefore, litigation, involving the EAP exemption. According to the joint comment submitted by 57 labor law professors, "the excessive importance of the duties test has resulted in the relatively high volume of litigation surrounding the exemptions and the many successful claims that have been asserted against employers in recent years," so raising the salary level "will benefit employers by providing them more certainty and relieve them of the litigation and other costs of disputes over classification and misclassification." Weirich Consulting & Mediation (Weirich Consulting) commented in support of the salary level change because it will make it easier "to determine more efficiently—and without needless litigation—whether or not particular employees are exempt." Other commenters representing employers disagreed, however, with Jackson Lewis, NAM, and the Wage and Hour Defense Institute predicting that finalizing the proposed salary level would increase (rather than decrease) litigation. Jackson Lewis commented that the duties test is the main driver of litigation over the EAP exemption, and "there will be no end to litigation" so long as employers must continue to apply the standard duties tests to employees earning above the salary threshold. Jackson Lewis and NAM further asserted that the rule will result in additional litigation brought by "very dissatisfied" newly overtime-protected employees. Finally, Fisher & Phillips commented that the "collateral results" of selecting a particular salary level, including avoiding or reducing litigation, are not appropriate factors for setting the salary level required for the EAP exemption.

As we stated in the NPRM, the number of wage and hour lawsuits filed in federal courts increased substantially in the period between 2001 and 2012, from approximately 2,000 to approximately 8,000 per year, with stakeholders advising the Government Accountability Office that one of the reasons for the increased litigation was employer confusion about which workers should be classified as EAP exempt. *See* 80 FR 38531. Thus, these statistics support the Department's conclusion that the current standard salary level was not effective in 2004 at distinguishing between exempt and nonexempt workers and is substantially less effective today. Litigation under the FLSA remains high, with approximately 8,000 FLSA cases continuing to be filed each year.[51]

Although we did not establish the standard salary level in this Final Rule for the purpose of reducing litigation, we believe that reduced litigation will be one of the beneficial impacts of that increase. The salary level will once again serve as a clear and effective line of demarcation, thereby reducing the potential for misclassification and litigation. *See* Weiss Report at 8 (the salary tests prevent "the misclassification by employers of obviously nonexempt employees, thus tending to reduce litigation. They have simplified enforcement by providing a ready method of screening out the obviously nonexempt employees, making an analysis of duties in such cases unnecessary."). Given the new standard salary level, there will be 9.9 million fewer white collar employees for whom employers could be subject to

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of recordkeeping works best for their business and their employees. For example, employers may require their employees to record their hours worked; alternatively, some employers might decide to record the hours themselves. Where an employee works a fixed schedule that rarely varies, the employer may simply keep a record of the schedule and indicate the number of hours the worker actually worked only when the worker varies from the schedule ("exceptions reporting"). 29 CFR 516.2(c). Furthermore, the Department believes that most employers already maintain recordkeeping systems for their overtime-eligible employees and that these systems can accommodate newly overtime-eligible employees.

[51] *See http://www.uscourts.gov/statistics/table/c-2/statistical-tables-federal-judiciary/2014/12/31; http://www.uscourts.gov/statistics/table/c-2/federal-judicial-caseload-statistics/2015/03/31.*

potential litigation regarding whether they meet the duties test (4.2 million currently EAP-exempt employees who will be newly entitled to overtime because they earn less than the new standard salary and 5.7 million overtime-eligible white collar employees paid between $455 and $913 per week whose exemption status no longer depends on the application of the duties test).[52]

7. Comments About Non-Profit Employers

A substantial number of commenters also addressed the impact that the proposed standard salary would have on non-profit employers. While many of the concerns that the non-profit employers expressed were the same as those identified by other employers, some of these commenters also addressed particular concerns that they believe they would face due to their non-profit status.

Many non-profit employers, including Habitat for Humanity, the National Multiple Sclerosis Society, the New Jersey Association of Mental Health and Addiction Agencies, Operation Smile, Catholic Charities, and the U.S. Public Interest Research Group (USPIRG), emphasized that non-profits generally pay lower salaries than for-profit employers, and therefore the proposed salary level would not serve as an effective dividing line between employees performing exempt and overtime-protected work in the non-profit sector.

For example, USPIRG stated that 75 percent of employees it has classified as exempt receive a salary below the 40th percentile of full-time salaried workers nationally. Operation Smile commented that the proposed standard salary would increase its payroll costs by nearly $1 million per year and affect more than 50 percent of its workforce. Habitat for Humanity similarly stated that the majority of its affiliates pay their highest paid employee less than $50,440 and estimated that approximately 40 percent of its affiliates' staff members would be directly affected by the proposed salary increase.

A number of non-profit commenters, including the Alliance for Strong Families and Communities, ANCOR, Catholic Charities, Easter Seals, Habitat for Humanity, and USPIRG, emphasized that they do not have the same ability as other employers to increase prices or reduce the profits paid to shareholders to compensate for the increased costs of the proposed salary; some noted this is because the prices for the services they provide are set in government contracts or by Medicaid, or because their revenue is based on grants reflecting labor costs at the time the grant is made and there may be no option for seeking an increase in funding. Several nonprofits expressed concern that they are constrained in their ability to increase salaries for their staff because funders evaluate them based on their ability to keep overhead, including salary costs, low, or because the terms of their grants may strictly limit how much of the grant can be allocated for overhead. *See, e.g.,* Boy Scouts of America; Food Bank of Northern Nevada; The Groundwater Foundation; Operation Smile. Based upon these funding issues, many commenters stated that the unintended consequence of the increased standard salary level would be a decline in the quantity or quality of the critical services they provide to vulnerable individuals. *See, e.g.,* CUPA–HR; Father Flanagan's Boys' Home; Lutheran Services in America; National Multiple Sclerosis Society; Salvation Army. Therefore, many non-profit organizations requested that the Department provide special relief for non-profits such as: An exemption from the salary requirement; a reduced salary level for non-profits; an incremental phased-in increase of the salary level over a period of a year or more for non-profits; a delayed implementation date for non-profits; and the elimination of automatic updating for non-profits. *See, e.g.,* Alliance for Strong Families and Communities; Boy Scouts of America (BSA); Boys and Girls Clubs of America; Habitat for Humanity; Independent Sector; United Community Ministries; YWCA.

Nevertheless, despite their concerns regarding the potential impact of the proposed salary level, many non-profit employers expressed their general support for the intent and purpose of the rule. *See, e.g.,* Catholic Charities; Easter Seals; Independent Sector; Maryland Nonprofits; PathStone Corporation; United Community Ministries; YWCA. Moreover, some non-profits, citing their role as both employers and service providers, supported the application of the NPRM to non-profits as proposed. For example, PathStone Corporation, and a comment submitted by CASA on behalf of 21 additional non-profit organizations, stated they fully supported the proposed regulation, with the joint CASA comment emphasizing that the "justice we seek for our clients in the world must also exist within our own organizations." Similarly, Maryland Nonprofits commented that "[t]he nonprofit community recognizes better than most the harsh economic realities that lead to this proposed rule, and we strongly endorse its purpose."

Other commenters indicated that the impact on non-profit employers would not be as significant as most non-profits feared. For example, the comment submitted by 57 labor law professors noted that an economist found that management employees working for non-profits earned an average of $34.24 per hour in 2007, which far exceeds the proposed salary level, and that they presumably earn more than that now. Therefore, they concluded that the regulations "should not have a deleterious effect on these valuable organizations or their efforts to accomplish their important missions." EPI also stated that, where a non-profit is engaged in revenue-producing activities and, thus, is competing with for-profit businesses, it "is only fair" that "it should be held to the same employment standards" to achieve a level playing field with regard to the employees who are involved with that commercial business or who are engaged in interstate commerce. Other commenters, such as the Wisconsin Association of Family and Children's Agencies, questioned the wisdom of a non-profit exemption, explaining that for-profit agencies may perform the same services as non-profits and rely on the same government funding streams and a non-profit exemption would not help the similarly situated for-profit service providers.

The Department recognizes and values the enormous contributions that non-profit organizations make to the country. Nonprofit organizations provide services and programs that benefit many vulnerable individuals in a variety of facets of life, including services that benefit the vulnerable workers who the Department also works to protect by ensuring that their workplaces are fair, safe, and secure. In response to the commenters' concerns, we note that (as discussed in detail above) we have modified the proposed salary level to account for the fact that salaries are lower in some regions than others. This change yields a salary at the low end of the historical range of short test salaries. This lower final salary level will also provide relief for non-profit employers, just as it does for employers in low-wage industries.

However, regarding the commenters' suggestions that we create a special exemption from the salary requirement, a lower salary level, a delayed implementation date, or a phase-in period for non-profits, we note that the Department's EAP exemption regulations have never had special rules for non-profit organizations; the employees of non-profits have been removed from minimum wage and overtime protection pursuant to the EAP exemptions only if they satisfied the same salary level, salary basis, and duties tests as other employees.

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[52] The Department estimates that 732,000 of these white collar salaried workers are overtime-eligible but their employers do not recognize them as such. *See* section VI.C.ii.

The Department concludes that such special treatment is not necessary or appropriate. As the comment from the 57 labor law professors noted, a study of National Compensation Survey data showed that the average hourly wage of full-time management employees in the not-for-profit sector was $34.24 per hour in 2007 ($1,369 per 40-hour workweek), which substantially exceeds the Final Rule's required salary of $913 per week.[53] The average hourly wage for such management workers at non-profits had increased to $38.67 by 2010 ($1,547 per 40-hour week), which is more than 50 percent higher than the 2016 required standard salary.[54] Moreover, the average hourly wages of non-profit employees are not uniformly lower than those of employees in other sectors. For example, in 2007 the average hourly wages of both full-time business and financial operations employees and computer and mathematical science employees working at non-profits, $26.49 and $32.00 per hour, respectively, exceeded the average hourly earnings of such workers employed in State government.[55] Wages of full-time workers in healthcare practitioner and technical occupations for non-profits averaged $28.85 per hour in 2007, higher than those for employees in the same occupations in State and local governments ($23.89 and $27.30, respectively). Similarly, the 2007 average earnings of registered nurses were $30.80 per hour at non-profits, higher than those of registered nurses at private establishments ($30.58) and at State and local governments ($29.60).[56]

Based on CPS data, the Department projects that for FY 2017, the median weekly earnings for affected workers in non-profits will be $741.68 while the median weekly earnings of affected workers in the private sector will be $745.54. The Department recognizes however, that non-profit entities may have a higher share of affected workers than for-profit entities, but does not believe that this will unduly impact this sector. If all affected workers in the non-profit sector who regularly work overtime were increased to the new salary level this would increase the total amount that non-profits pay EAP workers by 0.5 percent, compared to an increase of 0.3 percent in other sectors.[57] Therefore, the Department concludes that treating non-profit employers differently than other employers, such as by creating a special salary level or an extended phase-in period is not appropriate and is not necessary, particularly given the fact that the Final Rule modifies the proposed rule by basing the standard salary level on salaries in the lowest-wage Census Region.

Finally, the Department also received comments from a number of non-profit higher education institutions. As discussed above, some commenters from the higher education community also asked for guidance on the application of the EAP exemption to educational institutions. Additionally, however, several commenters expressed concern about the impact that the Final Rule would have on higher education, with some suggesting a lower salary level for educational institutions. *See, e.g.,* Iowa Association of Community College Trustees; CUPA–HR; Purdue University; South Carolina Independent Colleges and Universities. We recognize that higher education is a complex and important sector in our economy, including a variety of both private and public institutions, from small community colleges to large research institutions.

Commenters representing research institutions raised concerns about the impact of the proposed rule on postdoctoral researchers. For example, CUPA–HR noted that the National Institutes of Health (NIH) stipend levels for post-doctoral researchers are "well below" the proposed salary level and that post-doctoral researchers with less than five years of experience would no longer meet the salary level for exemption. The Department notes that the Final Rule salary level based on the 40th percentile in the lowest-wage Census Region addresses some of these concerns and results in a salary level met by the NIH FY 2016 stipend level for post-doctoral researchers with at least three years of experience and is only $208 a year above the stipend level for a post-doctoral researcher with two years of experience.

8. Other Comments

Like non-profit employers, other commenters, including local governments,[58] Indian tribes, for-profit entities receiving government funding, and commenters writing on behalf of small businesses, asserted that they do not have the same ability as other employers to increase prices or reduce their profits.[59] *See, e.g.,* BFT Holding; Charlotte County Government; Jamestown S'Klallam Tribe. Some commenters representing these groups, as well as other commenters, requested special treatment for certain industries or employers. For example, some small businesses and commenters representing them, including the American Association for Enterprise Opportunity, California Association for Micro Enterprise Opportunity, and WIPP, requested an exemption for small entities from the salary level or from the FLSA's requirements generally. Likewise, the Gila River Indian Community and the Ute Mountain Ute Tribe submitted comments urging the Department to "open consultation with Indian tribes on the use of a lower salary threshold for tribal entities" based on "the unique economic and demographic factors that tribes face." The Department did not propose special treatment for small businesses, tribal governments, or other entities, and did not request comment on these issues. The Department believes such special treatment is not necessary given that the Final Rule modifies the proposed rule by basing the standard salary level on salaries in the lowest-wage Census Region and this lower final salary level will provide relief for these stakeholders.

Conversely, some commenters requested that the Department apply the salary level test to employees who have historically not been subject to that test. For example, the Department received multiple comments from teachers, university faculty, and their representatives, asking us to repeal § 541.303(d), which provides that the salary level requirement does not apply to teaching professionals. *See, e.g.,* National Association for the Education of Young Children (NAEYC); NWLC; New Faculty Majority Foundation; SEIU. As the NAEYC acknowledged in its comment, this request is "beyond the scope" of the NPRM, which did not propose changes to or invite comment on § 541.303(d) or on § 541.600(e), which also provides that the salary requirement does not apply to teachers and certain other professionals. *See also* NWLC; SEIU. The Department notes that regardless of their salary, teachers qualify for the professional exemption only if they have a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and are employed and engaged in this activity as a teacher in an educational establishment by which they are employed.[60] *See* § 541.303(a).

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[53] *See http://www.bls.gov/opub/mlr/cwc/wages-in-the-nonprofit-sector-management-professional-and-administrative-support-occupations.pdf.* The non-profit series was stopped in 2010 and the 2007 report on management, professional and administrative support occupations is the most recent data available.

[54] *See http://www.bls.gov/ncs/ncswage2010.htm* (Table 33).

[55] *See http://www.bls.gov/opub/mlr/cwc/wages-in-the-nonprofit-sector-management-professional-and-administrative-support-occupations.pdf.*

[56] *See http://www.bls.gov/opub/mlr/cwc/wages-in-the-nonprofit-sector-healthcare-personal-care-and-social-service-occupations.pdf.*

[57] This is an overestimate as to both the non-profit and for-profit sectors. As explained in section VI.D. iv., we anticipate employers will increase the salary level only for workers for whom it is less expensive to pay the updated salary level than pay overtime.

[58] The Department notes that state and local governments have greater options for satisfying their overtime obligations than do private employers. In particular, under certain conditions, state or local government agencies may provide their employees with compensatory time off (comp time) instead of cash payment for overtime hours. The comp time must be provided at a rate of one-and-one-half hours for each overtime hour worked. For example, if a newly overtime-eligible state government employee works 44 hours in a single workweek, he would be entitled to 6 hours of compensatory time off. *See* 29 CFR part 553.

[59] Comments from state and local governments and from Indian tribes are also addressed in section VIII.

A number of comments, including a joint comment from the AIA–PCI, requested that the Department prorate the new salary level for part-time employees. The Department declines this request. That employers currently "can afford to pay part-time exempt employees the full salary required for exempt status, even if they work just 15 or 20 hours per week," as Seyfarth Shaw noted in support of this request, merely underscores the need to significantly increase the 2004 salary level. The Department has never prorated the salary level for part-time positions, and we considered and rejected a special rule for part-time employees performing EAP duties in 2004. *See* 69 FR 22171. The Department continues to believe that such a rule would be difficult to administer, and notes that the FLSA does not define full-time employment or part-time employment, but leaves this matter to be determined by employers. Employees hired to work part time, by most definitions, do not work in excess of 40 hours in a workweek, and overtime pay is not at issue for these employees. An employer may pay a nonexempt employee a salary to work part time without violating the provisions of the FLSA so long as the salary equals at least the minimum wage when divided by the actual number of hours the employee worked. *See* FLSA2008–1NA (Feb. 14, 2008). Employers can meet this standard with a salary of as little as $145 for twenty hours of work per week, and $217.50 for 30 hours of work per week—far below even the 2004 salary level.[61]

Finally, a small number of commenters, including the National Automobile Dealers Association, suggested that the Department should eliminate the salary level test entirely, so that the exempt status of every employee would be determined on the basis of their job duties and responsibilities alone. The Department has repeatedly rejected this approach, and we do so again in this rulemaking. The Department has long recognized that "the amount of salary paid to an employee is the 'best single test' of exempt status," and is the principal delimiting requirement preventing abuse. 69 FR 22172; Stein Report at 24. Further, as the Department explained in 2004, eliminating the salary test is contrary to the goal of simplifying the application of the exemption, which the President has directed us to do in this rulemaking, and would require a "significant restructuring of the regulations," including the "use of more rigid duties tests." 69 FR 22172.

B. Special Salary Tests

i. American Samoa

As explained in our proposal, the Department has historically applied a special salary level test to employees in American Samoa because minimum wage rates there have remained lower than the federal minimum wage. *See* 80 FR 38534. The Fair Minimum Wage Act of 2007, as amended, provides that industry-specific minimum wages rates in American Samoa will increase by $0.40 on September 30, 2018, and continue to increase every three years thereafter until each equals the federal minimum wage. *See* Sec. 1, Public Law 114–61, 129 Stat. 545 (Oct. 7, 2015). The minimum wage in American Samoa currently ranges from $4.58 to $5.99 an hour depending on the industry,[62] and so the disparity with the federal minimum wage is expected to remain for the foreseeable future. Accordingly, the Department proposed to continue our longstanding practice of setting the special salary level test for employees in American Samoa at approximately 84 percent of the standard salary level, which would have resulted in a salary of $816 based on fourth quarter 2015 data for full-time salaried workers nationwide.

The Department received only one comment on this aspect of our proposal—Nichols Kaster supported the proposed increase. We conclude that the proposed methodology remains appropriate, and the Final Rule accordingly sets the special salary level for American Samoa at 84 percent of the standard salary level set in the rule, which equals $767 per week. The Department has revised § 541.600(a) accordingly.

ii. Motion Picture Producing Industry

The Department has permitted employers to classify as exempt employees in the motion picture producing industry who are paid at a base rate of at least $695 per week (or a proportionate amount based on the number of days worked), so long as they meet the duties tests for the EAP exemptions. *See* § 541.709. This exception from the "salary basis" requirement was created in 1953 to address the "peculiar employment conditions existing in the [motion picture] industry," 18 FR 2881 (May 19, 1953), and applies, for example, when a motion picture industry employee works less than a full workweek and is paid a daily base rate that would yield at least $695 if six days were worked. *See id.* Consistent with our practice in the 2004 Final Rule, the Department proposed to increase the required base rate proportionally to the proposed increase in the standard salary level test, resulting in a proposed base rate of $1,404 per week (or a proportionate amount based on the number of days worked). This method would have resulted in a base rate of $1,487 based on fourth quarter 2015 data for full-time salaried workers nationwide.

The Department did not receive any substantive comments on this subject; two commenters, Nichols Kaster and the UAW, offered general support for this proposal. The Final Rule adopts the methodology set forth in our proposal, and using the new standard salary level

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[60] The National Head Start Association and several other commenters associated with Head Start asked the Department to consider adopting the position that all Head Start and Early Head Start facilities are "educational establishments," and therefore that teachers at these facilities can meet the professional exemption. The NPRM did not propose changes to or invite comment on § 541.303(a) or § 541.204(b) (which defines "educational establishment"), and the Final Rule makes no changes to these sections.

[61] SIFMA noted that some employees who will not meet the salary threshold because they work part time, may nevertheless have responsibilities during certain periods (for example, tax season) that require them to work more than 40 hours in a week. In such instances, if the employee earns less than the standard salary level, the employee is eligible to receive overtime premium pay for hours worked over 40 in a week.

[62] *See* WHD Minimum Wage Poster for American Samoa, available at: *http://www.dol.gov/whd/minwage/AmericanSamoa/ASminwagePoster.pdf.*

($913) results in a base rate of $1,397 per week (or a proportionate amount based on the number of days worked).[63] The Department has revised § 541.709 to incorporate this change.

iii. Other Comments Requesting Special Salary Tests

The Department also received approximately a dozen comments concerning application of the proposed salary level to Puerto Rico. Nearly all of these commenters urged the Department to either exempt Puerto Rico from the updated standard salary level requirement (thus keeping the salary level at $455) or to reinstate a special salary level test for Puerto Rico (set between the current and proposed salary levels).[64] In 1949, the Department established a special salary level for Puerto Rico because its minimum wage rate was below the FLSA minimum wage. *See* 14 FR 7705–06 (Dec. 24, 1949); Weiss Report at 21. The Fair Labor Standards Amendments of 1989 removed Puerto Rico from the special minimum wage provisions and instead applied the section 6(a)(1) minimum wage to Puerto Rico. *See* Sec. 4, Public Law 101–157, 103 Stat. 938 (Nov. 17, 1989). This change eliminated the justification for maintaining a special salary test in Puerto Rico, and so in the 2004 Final Rule we established that the standard salary level test applies to Puerto Rico. Puerto Rico continues to be subject to the section 6(a)(1) minimum wage, and the Department has consistently maintained a uniform salary level for all states and also for all territories subject to the FLSA minimum wage.

C. Inclusion of Nondiscretionary Bonuses, Incentive Payments, and Commissions in the Salary Level Requirement

As indicated in the NPRM, the Department has consistently assessed compliance with the salary level test by looking only at actual salary or fee payments made to employees and, with the exception of the total annual compensation requirement for highly compensated employees, has not included bonus payments of any kind in this calculation. During stakeholder listening sessions held prior to the publication of the NPRM, several business representatives asked the Department to include nondiscretionary bonuses and incentive payments as a component of any revised salary level requirement. These stakeholders conveyed that nondiscretionary bonuses and incentive payments are an important component of employee compensation in many industries and stated that such compensation might be curtailed if the standard salary level was increased and employers had to shift compensation from bonuses to salary to satisfy the new standard salary level.

In recognition of the increased role bonuses play in many compensation systems, and as part of the Department's efforts to modernize the overtime regulations, the Department sought comments in the NPRM regarding whether the regulations should permit nondiscretionary bonuses and incentive payments to count towards satisfying a portion of the standard salary level test for the executive, administrative, and professional exemptions.[65] Specifically, the Department asked whether employers should be allowed to use nondiscretionary bonuses and incentive payments, paid no less often than monthly, to satisfy up to 10 percent of the standard salary level test. To ensure the integrity of the salary basis requirement, the Department stressed the importance of strictly limiting the amount of the salary requirement that could be satisfied through the payment of nondiscretionary bonuses and incentive pay, as well as the maximum time period between such payments. The Department did not propose any changes to how bonuses are treated under the "total annual compensation" requirement of the HCE test, and stated that we were not considering changing the exclusion of board, lodging, or other facilities from the salary calculation or expanding the salary level test calculation to include discretionary bonuses, payments for medical, disability, or life insurance, or contributions to retirement plans or other fringe benefits. *See, e.g.,* 80 FR 38535–36, 38537 n.36. However, the Department did seek comment on the appropriateness of counting commissions toward the salary level requirement.

The requirement that exempt employees be paid on a salary basis has been a part of the Department's part 541 regulations since 1940. As the Department said at that time, "a salary criterion constitutes the best and most easily applied test of the employer's good faith in claiming that the person whose exemption is desired is actually of such importance to the firm" that he or she is properly within the exemption. Stein Report at 26, *see also id.* at 19, 36. Since 1940, therefore, the regulations have required that an exempt EAP employee be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed. More recently, the Department has noted "that payment on a salary basis reflects an employee's discretion to manage his or her time and to receive compensatory privileges commensurate with exempt status." 69 FR 22177. While, as the Department noted in the NPRM, employers are allowed to pay additional compensation beyond the required salary in the form of bonuses, those payments have not counted towards the payment of the required minimum salary level. The Department's discussion in the NPRM of including nondiscretionary bonus payments in the standard salary level was informed by our concern that permitting the standard salary level to be satisfied by bonus payments that frequently correlate to the quantity and quality of work performed could undermine the utility of the salary basis requirement in identifying bona fide EAP employees.

The Department received a variety of comments concerning whether the regulations should permit nondiscretionary bonuses and incentive payments to satisfy a portion of the standard salary level test. Commenters representing employers generally supported this change as an improvement over the current regulations, though many objected that the option the Department was considering was too restrictive. Most of the commenters representing employees that addressed this idea opposed it on the grounds that it would complicate the test for exemption and undermine the worker protections established by the salary basis requirement.

Commenters representing employers offered a range of reasons for generally supporting the inclusion of nondiscretionary bonuses and incentive payments. Many commenters, including ACRA, the National Association of Convenience Stores (NACS), and the NRA, agreed that such payments are a key part of exempt employees' compensation in their industries. For example, EBS Building Supplies stated that its managers "can earn as much in bonus payments as they earn in regular salary during the year," and Mill Creek Companies stated that nondiscretionary performance incentives can account for "up to 40% of a person's total compensation and are a most critical part of our strategy to align the goals of first line supervisors and professionals with the goals of the company."

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[63] The Department calculated this figure by dividing the new salary level ($913) by the current salary level ($455), and then multiplying this product (rounded to the nearest hundredth) by the current base rate ($695). This produces a new base rate of $1,396.95, which we rounded to the nearest whole dollar ($1397).

[64] Commenters included the Cadillac Group of Companies, Caribbean Restaurants, the Puerto Rico Bankers Association, the Puerto Rico Chamber of Commerce, the Puerto Rico Hotel & Tourism Association, the Puerto Rico Manufacturers Association, the Secretary of Labor for Puerto Rico (the Honorable Vance Thomas), the Training and Labor Affairs Advisory and Human Resources Administration Office (OCALARH, by its Spanish acronym), one individual commenter, and one anonymous commenter. Two individual employee commenters from Puerto Rico offered general support for the Department's proposal.

[65] Promised bonuses such as those announced to employees to induce them to work more efficiently or to remain with the firm are considered non-discretionary. *See* 29 CFR 778.211(c). Examples include individual or group production bonuses, and bonuses for quality and accuracy of work. Incentive payments, including commissions, are also considered non-discretionary.

WorldatWork conducted a survey of its human resources manager members and found that "62% of respondents said their employers offer nondiscretionary incentive bonuses tied to productivity and/or profitability." Several trade associations reported similar feedback from their members. The World Floor Covering Association stated that its "members have indicated that many managers and administrators receive bonuses based on the sales of the stores that they manage or oversee," and the National Pest Management Association stated that 93 percent of its member companies reported providing some form of nondiscretionary bonuses. The Chemical Industry Council of Illinois and the National Council of Farmer Cooperatives respectively emphasized that nondiscretionary bonuses "are an integral part" or "play an important role" within an employee's total compensation package. RILA noted that in the retail industry "many retail managers and other exempt employees earn bonuses or other incentive payments designed to encourage a sense of ownership consistent with their important leadership roles within the organization," and that "[c]ounting non-discretionary bonuses toward the minimum threshold for exemption is consistent with the purpose of the salary level test—the payment, criteria, or amount of these bonuses often reflects the exempt status of the recipients."

Many commenters that opposed the Department's proposed increase to the standard salary level, including CalChamber Coalition, Fisher & Phillips, FMI, Littler Mendelson, and the National Association of Professional Insurance Agents, acknowledged that allowing employers to satisfy a portion of the salary level with bonuses and incentive payments would to some extent mitigate the financial burden of the proposed increase. Other commenters, including IFA and the Sheppard Mullin law firm, stated that not allowing nondiscretionary bonuses and incentive payments to satisfy some portion of the increased salary level would likely reduce the prevalence of those forms of compensation.

Among commenters that supported the inclusion of nondiscretionary bonuses and incentive payments in the standard salary guarantee amount, many objected that the option considered in the Department's NPRM was too restrictive to be of much practical use for employers. For example, several commenters representing employers criticized the Department's proposal to cap the crediting of nondiscretionary bonuses or incentive payments at no more than 10 percent of the standard salary level, noting that bonuses, incentive payments, and commissions often comprise a far greater portion of an exempt employee's total compensation. The Chamber stated that "unless the Department reconsiders its proposed $50,440 salary level, a limit of 10 percent (or, $5,044) is too low to provide any relief or make the additional administrative burdens worth the effort." FMI, the National Association of Truck Stop Operators, Printing Industries of America, RILA, Weirich Consulting, and a number of other commenters requested that the Department allow such compensation to count for up to 20 percent of the standard salary level. Other commenters suggested a higher percentage, including CalChamber Coalition (at least 30 percent), ACRA (at least 40 percent), and HR Policy Association (50 percent). Many commenters, including Fisher & Phillips, the National Beer Wholesalers Association, and the National Pest Management Association, opposed the imposition of any percentage cap on the proportion of the salary level test that could be satisfied with such payments. Several commenters, however, supported the Department's 10 percent limitation. *See, e.g.,* Concord Hospitality Enterprises; Fraternity Executive Association.

Commenters also criticized the Department's decision to consider crediting nondiscretionary bonuses and incentive payments toward the salary level test only if they are paid on a monthly or more frequent basis. According to AIA–PCI and PPWO, such a limitation fails to account for the fact that bonus payments "are typically made less often than monthly because they are tied to productivity, revenue generation, profitability, and other larger and longer-term business results that can fluctuate significantly on a month-to-month basis." *See also* NRA. AH&LA stated that many "supplemental compensation programs in the lodging industry are not structured to be paid with such frequency and it would place a significant administrative burden on employers to calculate and pay incentive compensation on a monthly or more frequent basis." AH&LA and many other commenters requested that the Department credit bonuses and incentive payments paid on an annual basis against the salary level. HR Policy Association pointed out that bonuses paid annually are already included within the "total compensation requirement" under the HCE test, while the Society of Independent Gasoline Manufacturers (SIGMA) stated that "permitting employers to count bonuses annually incentivizes them to hire employees on an annual basis, ultimately promoting job security and long-term employment." In the absence of crediting annual bonuses, SIGMA and several other commenters, including IABI, AIA–PCI, the American Institute of Certified Public Accountants, PPWO, and Weirich Consulting, urged the Department to credit bonuses and incentive payments paid on a quarterly basis or less frequently. Other commenters favored the quarterly frequency outright. *See, e.g.,* American Resort Development Association; Fraternity Executives Association. Fisher & Phillips and the NACS opposed imposing any timeframe limitation, but conceded that "experience suggests [quarterly] is a not-uncommon frequency for the payment of such amounts."

Several commenters requested that the Department allow employers to make catch-up (or "true-up") payments to eliminate the risk of non-compliance in the event that an employee's bonuses or incentive payments drop such that the employee fails to satisfy the salary level requirement in a given period. For example, SIFMA wrote that they saw "no basis for distinguishing the use of true-up payments outside of the context of highly compensated employees," and remarked that "[a]llowing true-up payments to count helps ensure that exempt employees are receiving the guaranteed income they anticipated and is consistent with the historical salary basis approach of ensuring guaranteed income." If annual catch-up payments are not permitted, NRA urged the Department "to permit employers to make catch-up payments based on when they pay the bonuses, *i.e.,* monthly, semi-annually, or quarterly."

Many commenters that supported the crediting of incentive payments urged the Department to also allow employers to credit commissions. Several commenters agreed with PPWO that "all forms of compensation should be used to determine whether the salary level has been met," pointing out that the CPS earnings data for nonhourly employees that the Department is using to derive the standard salary level includes discretionary bonuses and commissions. Many commenters disputed the Department's observation in the NPRM that "employees who earn commissions are usually sales employees who . . . are generally unable to satisfy the standard duties test," 80 FR 38536. AT&T stated that it "has management positions whose responsibilities involve the supervision of sales teams and support sales channels that receive commissions as part of their salaries and that have been found to be exempt under the executive and administrative exemptions," and the Chamber and FMI likewise commented that in the real estate and insurance industries "[m]any exempt employees who perform little direct sales work share commissions." A few other commenters pointed to a 2006 opinion letter advising that certain "registered representatives" in the financial services industry qualify for the administrative exemption even though they receive commissions and bonuses in addition to their salary. *See* FLSA2006–43 (Nov. 27, 2006).

Other commenters urged the Department to count discretionary bonuses toward the salary level. For example, PPWO stated that "[s]uch payments are in many ways even more reflective of an individual employee's efforts and contributions (and by implication their exercise of independent judgment and other characteristics of the duties' test) than nondiscretionary bonuses."

Many commenters opposed permitting nondiscretionary bonuses and incentive payments to satisfy a portion of the standard salary level test. Some commenters stated that nondiscretionary bonuses and incentive payments do not indicate an employee's exempt status. For example, NELA and Rudy, Exelrod, Zieff & Lowe wrote that the types of nondiscretionary bonuses described in the Department's regulations—including "bonuses that are announced to employees to induce them to work more steadily, rapidly, or efficiently; bonuses to remain with the employer; attendance bonuses; individual or group production bonuses; and bonuses for quality and accuracy of work"—are "intended to incentivize workers of all types to perform their duties well; but, do not afford them any benefits of ownership." These commenters noted further that lower level employees whom they have represented also received these types of bonuses, and thus, the commenters concluded that such bonuses "have no bearing on whether an employee should be excluded from overtime requirements." The Georgia Department of Administrative Services and the Mississippi State Personnel Board each cautioned that there is "no guarantee that the work rewarded by the bonus or incentive payment will be FLSA exempt in nature," while KDS Consulting stated that crediting bonuses and incentive payments would undermine the premise "that management values the salaried worker's position for some reason outside of time and task."

Several commenters asserted that allowing nondiscretionary bonuses and incentive payments to satisfy a portion of the standard salary level would dramatically complicate application of the EAP exemptions, and introduce periodic uncertainty regarding the exempt status of employees who would need such payments to meet the salary level requirement. Nichols Kaster stated that allowing nondiscretionary bonuses and incentive payments to satisfy 10 percent of the standard salary level "could alter employees' exempt status on a weekly basis," and put employers in a position where they "would incur substantial compliance costs reviewing their payroll *on a weekly or monthly basis* to determine which employees satisfied the salary basis test" (emphasis in comment). AFL–CIO and IAFF each wrote that the proposal would be "in direct contradiction to the purpose of the proposed rule, which is to clarify, streamline and simplify the regulations," while NELA and Rudy, Exelrod, Zieff & Lowe commented that "[a]dding this component to the threshold inquiry would only make the calculation more confusing and spur additional transaction costs to what should be a straightforward computation." Nichols Kaster, NELA, and The Labor Board, Inc., each warned that allowing bonuses to satisfy a portion of the standard salary level would likely increase FLSA litigation, while AFL–CIO noted that permitting nondiscretionary bonuses and incentive payments to satisfy a portion of the standard salary level "could lead to anomalous results" where employees with similar job duties could be classified differently depending on the criteria for the bonuses.

Commenters also contended that allowing nondiscretionary bonuses and incentive payments to satisfy a portion of the standard salary level would undermine the scheduling flexibility and income security associated with exempt status, as codified in the salary basis requirement. Nichols Kaster opined that such a change "erodes the salary basis test . . . [by] replac[ing] the certainty of a salary with the uncertainty of fluctuating compensation," and would have the practical effect of reducing the standard salary level. NELA and Rudy, Exelrod, Zieff & Lowe agreed, stating that the Department's proposal "runs contrary to the stated purpose of the salary basis test, which is to make sure exempt employees are guaranteed a minimum level of income that is dependable and predictable to meet their families' monthly expenses before they are exempted from the protections of the overtime provisions of the FLSA." These commenters further indicated that "[c]hanging the salary threshold calculation to include nondiscretionary bonuses would also create a perverse incentive to employers to move towards implementing more deferred compensation pay structures." Nichols Kaster wrote that "an exempt employee who chooses not to leave work early for a parent-teacher conference for fear of missing a weekly production metric loses some of the benefit of her exempt status: The receipt of her full pay for any week in which she performs any work without regard to the number of days or hours worked" (internal quotation marks and citation omitted). Moreover, Nichols Kaster asserted that "an 'attendance bonus' that penalizes an employee for partial day absences would be nothing more than an end-around the existing prohibition on partial day deductions from salary."

Finally, some commenters warned of possible negative consequences that might result from allowing bonuses and incentive payments to satisfy a portion of the standard salary level. For example, the Georgia Department of Administrative Services and the New Mexico State Personnel Board stated that crediting such payments would create "a competitive disadvantage for public sector employers," because public employers are not able to provide non-discretionary bonuses and incentive payments. KDS Consulting speculated that allowing bonuses and incentive payments to satisfy a part of the standard salary level would undermine the incentivizing value of such payments, to the extent that employers must pay them to maintain the exempt status of their employees.

After considering the comments, the Department has decided to permit nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard weekly salary level test, provided these forms of compensation are paid at least quarterly. The Final Rule revises

§ 541.602(a) to incorporate this new flexibility.

The Department analyzed comments mindful of the need to ensure that the salary level test accounts for employer payment practices without compromising the critical function of the salary basis test, which is to serve as a key indicator of exempt status. Commenters representing employer interests persuasively explained that nondiscretionary bonuses are an important part of many employer compensation systems that cover EAP employees. Modifying the tests for exemption to incorporate this fact is consistent with the President's directive to modernize the part 541 regulations. The Department also recognizes the concerns expressed by employee advocates, however, that in some instances nondiscretionary bonuses may not be indicative of exempt status and that counting such compensation toward the standard salary level may undermine the flexibility and income security associated with exempt status. While we share the concern that some bonus and incentive programs cover both overtime exempt and overtime-eligible employees, and the correlation of those programs with exempt status is therefore questionable, we are persuaded overall that the provision of nondiscretionary bonus and incentive payments has become sufficiently correlated with exempt status (for example, as evidence of the overtime exempt employee's exercise of management skill or exercise of independent judgment) that its inclusion on a limited basis in the standard salary requirement is appropriate. However, because such payments also correlate directly or indirectly in many instances with either the quantity or quality of work performed, we believe that careful limits must be set on how nondiscretionary bonuses and incentive pay are applied to the salary level test.

The Department also sought comments on the appropriateness of including commissions as part of nondiscretionary bonuses and other incentive payments that could partially satisfy the standard salary level test. In the NPRM, we raised the concern that it may be inappropriate to count commissions toward the salary level because employees who earn commissions are usually sales employees who—with the exception of outside sales employees—are generally unable to satisfy the duties test for the EAP exemptions. Comments from the Chamber, FMI, AT&T, and others have convinced us that it is not uncommon for employees who are not sales personnel, such as supervisors of a sales team, to earn commissions based on the sales of the employees they supervise. Since such supervisors may satisfy the duties test, the Department has concluded that it is appropriate to treat commissions like other types of nondiscretionary bonuses and permit them to be used to satisfy a portion of the salary level test. Accordingly, we have concluded that permitting commissions to count against a limited portion of the standard salary will not undermine the effectiveness of the salary basis test in identifying exempt employees. This change will also ensure that exemption status does not depend on (and that this rulemaking does not interfere with) whether an employer chooses to label or structure a nondiscretionary incentive payment as a "bonus" or as a "commission." This change is also consistent with the Department's position that certain "registered representatives" in the securities and financial services industry who receive commissions may qualify for the administrative exemption. *See* FLSA2006–43 (Nov. 27, 2006).

In the NPRM, the Department stated that we were not considering expanding the salary level test calculation to include discretionary bonuses or changing the exclusion of board, lodging, or other facilities from the salary calculation, a position that the Department has held consistently since the salary requirement was first adopted. The Department also declined to consider including in the salary requirement payments for medical, disability, or life insurance, or contributions to retirement plans or other fringe benefits. The Department reemphasizes here that such forms of compensation remain excluded from the salary level test calculation.

Many commenters asked the Department to increase beyond 10 percent the portion of the standard weekly salary level employers could satisfy using nondiscretionary bonuses and incentive payments. After consideration, the Department declines these requests. Because the Department has long found that the payment of a fixed predetermined salary not subject to change based on the quantity or quality of work is a strong indicator of exempt EAP status, it is important to strictly limit the percentage of the salary requirement that nondiscretionary bonuses and incentive payments can satisfy. Accordingly, setting the limit above 10 percent could undermine the premise of the salary basis test by depriving workers of a predetermined salary that does not fluctuate because of variations in the quality or quantity of their work and thus is indicative of their exempt status.[66] We believe that a 10 percent limit is also appropriate given that we are including nondiscretionary bonuses, incentive payments, and commissions as part of the salary level test for the first time and the full impact of this change on determination of EAP status is not yet known. Because this is the first time we have included nondiscretionary bonuses, incentive payments, and commissions, the Department may revisit this threshold if future experience supports additional changes to § 541.602(a)(3).

The Department takes note of comments from government employers that expressed their view that inclusion of nondiscretionary bonuses and incentive payments in the salary level creates a competitive disadvantage for them. The Department believes that by limiting to 10 percent the amount of nondiscretionary bonuses and commissions that can count toward the required weekly minimum salary level, we strike an appropriate balance which allows employers to use expanded sources of income to meet the required salary level, does not unduly harm government employers, and ensures that the salary basis requirement remains "a valuable and easily applied criterion that is a hallmark of exempt status." 69 FR 22175. The Department also acknowledges the concern articulated by AFL–CIO that this change to the part 541 regulations may result in employees with similar job duties being classified differently depending on the criteria for the bonuses. However, such discrepancies are unavoidable with a salary requirement and already exist, for example, when regional differences in pay structure result in two employees performing the same job in different locations having different exemption status.

The Department also requested comments on whether payment on a monthly basis is an appropriate interval for nondiscretionary bonuses to be credited toward the weekly salary requirement. Numerous commenters stated that a policy requiring payment no less frequently than on a monthly basis would fail to reflect current bonus payment practices and would make it difficult for employers to utilize the new regulation. The Department believes it is appropriate to increase the permissible bonus payment interval, and is persuaded by comments from PPWO and others suggesting that quarterly (as opposed to monthly) payments of nondiscretionary bonus and commission income give employers sufficient opportunity to measure, quantify, and calculate payments tied to productivity or profits. This lengthened interval should also limit the compliance costs that some commenters suggested employers would incur from having to review payroll on a monthly (or more frequent) basis to determine which employees satisfied the salary level test. Accordingly, § 541.602(a)(3) establishes that in order for nondiscretionary bonuses and incentive payments (including commissions) to satisfy a portion of the standard salary level test for the executive, administrative, and professional exemptions, such compensation must be paid at least quarterly.

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[66] This 10 percent limit concerns an employer's ability to count nondiscretionary bonuses, incentive payments, and commissions toward the salary level requirement without violating the salary bases requirement. This limit does not impact an employer's continued ability to provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, provided the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis. *See* § 541.604(a).

In response to commenter concerns, the Department has also determined that it is appropriate to permit a "catch-up" payment at the end of each quarter. This will help decrease the administrative burden on employers and ensure that exempt employees receive the compensation to which they are entitled. The Department declines to permit employers to make a yearly catch-up payment like under the test for highly compensated employees, as this would significantly undermine the integrity of the salary basis requirement, which ensures that exempt workers receive the standard salary level on a consistent basis so that it serves as the hallmark of their exempt status. This concern is not implicated in the HCE context because such employees must receive the entire standard salary amount each pay period on a salary or fee basis and the annual catch-up payment applies only to that part of total annual compensation in excess of the standard salary amount.

The Final Rule permits employers to meet the standard salary level requirement for executive, administrative, and professional exempt employees by making a catch-up payment within one pay period of the end of the quarter. In plain terms, each pay period an employer must pay the exempt executive, administrative, or professional employee on a salary basis at least 90 percent of the standard salary level required in §§ 541.100(a)(1), 541.200(a)(1), or 541.300(a)(1), and, if at the end of the quarter the sum of the salary paid plus the nondiscretionary bonuses and incentive payments (including commissions) paid does not equal the standard salary level for 13 weeks, the employer has one pay period to make up for the shortfall (up to 10 percent of the standard salary level). Any such catch-up payment will count only toward the prior quarter's salary amount and not toward the salary amount in the quarter in which it was paid. For example, assume Employee A is an exempt professional employee who is paid on a weekly basis, and that the standard salary level test is $913 per week. In January, February, and March, Employee A must receive $821.70 per week in salary (90 percent of $913), and the remaining $91.30 in nondiscretionary bonuses and incentive payments (including commissions) must be paid at least quarterly. If at the end of the quarter the employee has not received the equivalent of $91.30 per week in such bonuses, the employer has one additional pay period to pay the employee a lump sum (no greater than 10 percent of the salary level) to raise the employee's earnings for the quarter equal to the standard salary level.[67] The Department recognizes that some businesses pay significantly larger bonuses; where larger bonuses are paid, however, the amount attributable toward the EAP standard salary level is capped at 10 percent of the required salary amount.

The Department reemphasizes that this rulemaking does not change the requirement in § 541.601(b)(1) that highly compensated employees must receive at least the standard salary amount each pay period on a salary or fee basis without regard to the payment of nondiscretionary bonuses and incentive payments. While few commenters addressed this precise issue, the Clearing House Association urged the Department to permit all types of bonuses and incentive payments to satisfy the entire HCE total compensation requirement, including the standard salary amount due each pay period. While nondiscretionary bonuses and incentive payments (including commissions) may be counted toward the HCE total annual compensation requirement, the HCE test does not allow employers to credit these payment forms toward the standard salary requirement. We conclude that permitting employers to use nondiscretionary bonuses and incentive payments to satisfy the standard salary amount is not appropriate because employers are already permitted to fulfill almost two-thirds of the HCE total annual compensation requirement with commissions, nondiscretionary bonuses, and other forms of nondiscretionary deferred compensation (paid at least annually). Thus, when conducting the HCE analysis employers must remain mindful that employees must receive the full standard salary amount each pay period on a salary or fee basis.

Finally, nothing adopted in this Final Rule alters the Department's longstanding position that employers may pay their exempt EAP employees additional compensation of any form beyond the minimum amount needed to satisfy the salary basis and salary level tests. *See* § 541.604(a). Similarly, as noted in the NPRM, overtime-eligible (*i.e.,* nonexempt) employees may also receive bonuses and incentive payments. Where nondiscretionary bonuses or incentive payments are made to overtime-eligible employees, the payments must be included in the regular rate when calculating overtime pay. The Department's regulations at §§ 778.208–.210 explain how to include nondiscretionary bonuses in the regular rate calculation.

D. Highly Compensated Employees

As noted in the NPRM, the Department's 2004 Final Rule created a new highly compensated exemption for certain EAP employees. Section 541.601(a) provides that such employees are exempt if they earn at least $100,000 in total annual compensation and customarily and regularly perform any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee. Section 541.601(b)(1) states that employees must receive at least $455 per week on a salary or fee basis, while the remainder of the total annual compensation may include commissions, nondiscretionary bonuses, and other nondiscretionary compensation. The regulation also clarifies that total annual compensation does not include board, lodging, and other facilities, and does not include payments for medical insurance, life insurance, retirement plans, or other fringe benefits. Pursuant to § 541.601(b)(2), an employer is permitted to make a final "catch-up" payment during the final pay period or within one month after the end of the 52-week period to bring an employee's compensation up to the required level. If an employee does not work for a full year, § 541.601(b)(3) permits an employer to pay a pro rata portion of the required annual compensation, based upon the number of weeks of employment (and one final payment may be made, as under paragraph (b)(2), within one month after the end of employment).

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[67] If the employer chooses not to make the catch-up payment, the employee would be entitled to overtime pay for any overtime hours worked during the quarter.

The Department stated in the NPRM that we continue to believe that an HCE test for exemption is an appropriate means of testing whether highly compensated employees qualify as bona fide executive, administrative, or professional employees, but we proposed to increase the total annual compensation requirement and update it automatically on an annual basis. In the 2004 Final Rule, the Department concluded that the requirement for $100,000 in total annual compensation struck the right balance by matching a much higher compensation level than was required for the standard salary level test with a duties test that was significantly less stringent than the standard duties test, thereby creating a test that allowed only appropriate workers to qualify for exemption. *See* 69 FR 22174. This total annual compensation requirement was set more than four times higher than the standard salary requirement of $455 per week, which totals $23,660 per year. *See id.* at 22175. Such a balancing of a substantially higher compensation requirement with a minimal duties test still is appropriate, so long as the required annual compensation threshold is sufficiently high to ensure that it continues to cover only employees who "have almost invariably been found to meet all the other requirements of the regulations for exemption." *Id.* at 22174.

In the NPRM, the Department proposed to update § 541.601 by increasing the total annual compensation required for the highly compensated test in order to ensure that it remains a meaningful and appropriate standard when matched with the minimal duties test. The Department noted that over the past decade, the percentage of salaried employees who earn at least $100,000 annually has increased substantially to approximately 17 percent of full-time salaried workers, more than twice the share who earned that amount in 2004; therefore, we proposed to increase the total annual compensation requirement to the annualized weekly earnings of the 90th percentile of full-time salaried workers nationally ($122,148 in 2013) to bring the annual compensation requirement more in line with the level established in 2004. Consistent with the 2004 regulations, the Department also proposed that at least the standard salary requirement must be paid on a salary or fee basis. The Department did not propose any changes to the HCE duties test.

Commenters provided both support for, and opposition to, the Department's proposal to increase the total annual compensation requirement for the HCE exemption, with some commenters preferring a higher compensation level and others preferring a lower level. Additionally, some commenters suggested that the HCE exemption should be eliminated entirely, while others suggested that the HCE duties test should be modified or eliminated. Both commenters representing employers and those representing employees generally provided much less comment on, and analysis of, the HCE proposal than they did regarding the other issues raised in the NPRM, however, with many commenters mentioning the HCE proposal only in passing or not at all.

Among those who supported the proposal as written, the American Federation of Government Employees (AFGE) indicated that the "new salary threshold for the HCE exemption provides a more accurate representation of which employees might be classified as exempt from the FLSA based on their salary," and stated that the 90th percentile of annual earnings of full-time salaried workers "provides an objective basis for determining which employees are truly 'highly-compensated' and likely to meet the qualifications of exemption from the FLSA." The Printing Industries of America also supported the proposal, stating that "we believe this is an appropriate level for this particular test." The Partnership indicated that increasing the HCE compensation threshold to the 90th percentile accounts for the fact that its 2004 value has eroded over time and "is appropriate to ensure that only the most highly paid employees are categorically excluded from overtime requirements, as was the rule's intent when it was adopted in 2004."

Some commenters stated that the proposed HCE total annual compensation requirement should be increased so that the percentage of employees falling within the new compensation level matched the percentage covered in 2004. For example, NELA and Rudy, Exelrod, Zieff, & Lowe indicated that "[i]n 2004, 6.3 percent of full-time salaried workers earned a salary higher than the HCE compensation level of $100,000 . . . [so in] order to maintain the . . . 93.7 percentile figure, the Department would need to increase the HCE compensation level to $150,000 per year."[68] These commenters asserted that such a level "is the proper approach if the exemption truly is going to exclude only those at the very top of the ladder," and indicated that a substantial increase from the current HCE compensation level is warranted to "reflect the purpose of this test." The commenters also cited to the 2004 Final Rule in which the Department stated that "virtually every salaried 'white collar' employee with a total annual compensation of $100,000 per year would satisfy any duties test." 69 FR 22174. Nichols Kaster similarly stated that the 90th percentile of salaried earnings is "too low to offset the minimal duties test of the HCE exemption." Nichols Kaster favored eliminating the HCE exemption entirely and stated that the "statutory text of the FLSA does not contain an exemption for highly compensated employees (HCEs)." This commenter also stated that there "is no causal connection between high compensation and exempt job duties," and thus expressed the view that "[s]uch a test does not accurately define or delimit bona fide exempt employees." However, Nichols Kaster stated that if the Department retains the HCE exemption, the compensation level should be increased to the 95th percentile, should not include "catch-up" pay, and should be based only on salary payments.

Other commenters opposed the Department's proposed increase to the HCE exemption's total annual compensation requirement. Tracstaffing opined that there "is no compelling reason to increase the minimum salary level for highly compensated salaried employees." H–E–B similarly stated that "[t]here is no public policy justification for paying overtime to an individual receiving a six figure annual income." SIFMA advocated "maintaining the $100,000 threshold for the highly compensated test, as the 'bright line' $100,000 mark furthers the goal of simplifying the analysis of who qualifies for the test." The Chamber, the National Lumber and Building Material Dealers Association, NSBA, PPWO, Seize This Day Coaching, and several other commenters all similarly commented that the compensation level should remain the same for the HCE exemption test. The Clearing House Association and SIFMA commented that the HCE exemption should not have an associated duties test.

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[68] In the 2004 Final Rule, the Department set the total annual compensation amount at a level approximating the highest 10 percent of likely exempt employees. In the NPRM, we noted that the HCE total annual compensation level covered approximately the highest 6.3 percent of all full-time salaried employees at the time it was set. 80 FR 38562; *see* 69 FR 22169 (Table 3). In commenting on the current proposal, some commenters addressed the proposal in terms of likely exempt employees (10 percent) while other commenters addressed the proposal in terms of all salaried employees (6.3 percent).

The Department has considered the comments regarding the HCE test for exemption and revises § 541.601 to set the total annual compensation required for the highly compensated exemption at the annualized weekly earnings of the 90th percentile of full-time salaried workers nationally as proposed ($134,004 based on the fourth quarter of 2015). The Department disagrees with comments asserting that the HCE exemption compensation level should not be increased. The highly compensated earnings level should be set high enough to avoid the unintended exemption of employees who clearly are outside the scope of the exemptions and are entitled to the FLSA's minimum wage and overtime pay protections.[69] *See* 69 FR 22174.

The Department notes that it has been 12 years since the HCE annual compensation level was set and, as with the standard salary level, the 2004 value has eroded over time. In FY2017, approximately 20 percent of full-time salaried workers are projected to earn at least $100,000 annually, about three times the share who earned that amount in 2004. *See* section VI.C.iv. In order to ensure that the HCE compensation level remains a meaningful and appropriate standard when matched with the minimal duties test, the Department is increasing the HCE compensation level to the annualized weekly earnings of the 90th percentile of full-time salaried workers nationally. This level, which is generally consistent with the level established in the 2004 Final Rule, is an appropriate proxy for identifying those white collar workers who may qualify as bona fide EAP workers without sweeping in overtime-eligible workers in high-wage regions. In response to the comments from employee representatives suggesting the new HCE compensation level should be even higher, the Department does not agree that a compensation level higher than the 90th percentile is necessary to ensure that virtually every salaried white collar employee would satisfy any duties test. The Department notes that the value of tying the HCE compensation level to wage data is that it will keep the HCE compensation level in tandem with increases in actual wages and therefore not grow either too slowly or too quickly. Therefore, the Final Rule increases the total annual compensation requirement to the annualized weekly earnings of the 90th percentile of full-time salaried workers nationally, which based on fourth quarter of 2015 data is $134,004.[70]

Additionally, the Department proposed to maintain the requirement that at least the standard salary amount must be paid on a salary or fee basis. Under the current rule, employees for whom the HCE exemption is claimed must receive the full standard salary amount of $455 weekly on a salary or fee basis. *See* § 541.601(b). The Department proposed to maintain this requirement, updating the amount that must be paid on a salary or fee basis to the 40th percentile of weekly earnings of full-time salaried employees nationally. The Final Rule maintains this requirement, but modifies the amount of the standard salary to the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region. The Department further stated that should it adopt a provision in the Final Rule permitting employers to take a credit against the payment of the standard salary level for nondiscretionary bonuses, that credit would not be applicable to the HCE exemption. 80 FR 38537 n.36. As previously discussed in section IV.C., the Department received almost no comments addressing the exclusion of bonus payments from satisfaction of the salary requirement for HCE employees. The Final Rule maintains the requirement that employees for whom the HCE exemption is claimed must receive the standard weekly salary amount on a salary or fee basis and does not permit employers to credit nondiscretionary bonuses for up to 10 percent of that salary payment as is permitted under this Final Rule under the standard salary test. Employers can already credit such payments toward the portion of the HCE total compensation requirement in excess of the standard salary level; the Department does not believe that allowing such payments to also satisfy a portion of the standard salary level for HCE employees would be appropriate.

A few commenters requested a regional adjustment for the HCE salary level. The Chamber stated that the "Department should set the highly compensated test using actual salary levels of exempt employees working in the South and in the retail sector that would meet the highly compensated exemption requirements." The Department notes that no regional adjustment has been made to the HCE compensation level in this Final Rule, just as this was not part of the 2004 Final Rule's determination of the compensation level required for the HCE exemption. The HCE exemption must use a national wage rate to effectively ensure that workers such as secretaries in high-wage areas, such as New York City and Los Angeles, are not inappropriately exempted based upon the HCE exemption's minimal duties test.

The Department proposed in the NPRM to annually update the HCE total annual compensation requirement. As explained in greater detail in the automatic updating section, the Department will automatically update the HCE compensation level every three years, beginning on January 1, 2020.

The Department did not propose any changes to the HCE duties test created in 2004 and makes no change to the HCE duties test in this Final Rule. With respect to the call by some commenters to eliminate the duties test for the HCE exemption, the Department notes that we have consistently declined to adopt a salary-only test, because our statutory authority is to define and delimit who is employed in a bona fide executive, administrative or professional capacity, and salary alone is not an adequate definition. In the 2004 Final Rule, the Department expressed our agreement with commenters "that the Secretary does not have authority under the FLSA to adopt a 'salary only' test for exemption, and reject[ed] suggestions from employer groups to do so," and further noted that "[t]he Department has always maintained that the phrase 'bona fide executive, administrative, or professional capacity' in the statute requires the performance of specific duties." *See* 69 FR 22173. The Department continues to require, as we did in the 2004 Final Rule, that an employee have a primary duty that includes performing office or non-manual work to qualify for the HCE exemption, and workers such as "carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers, laborers, and other employees who perform work involving repetitive operations with their hands, physical skill and energy are not exempt under this section no matter how highly paid they might be." § 541.601(d).

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[69] As the Department has previously noted this includes employees such as secretaries in high-wage markets. Courts have also found that real estate appraisers and chief inspectors also do not qualify for the HCE exemption. *See Boyd* v. *Bank of America Corp.*, 109 F.Supp.3d 1273 (C.D. Ca. 2015) (real estate appraisers); *Zubair* v. *EnTech Engineering P.C.*, 808 F.Supp.2d 592 (S.D.N.Y. 2011) (chief inspector who tested "concrete and paint sample and recommended project improvement to the overall paint systems").

[70] *See www.bls.gov/cps/research_series_earnings_nonhourly_workers.htm.*

With respect to Nichols Kaster's comment asserting that the HCE exemption lacks a meaningful duties test, the Department notes that pursuant to § 541.601(a), HCE employees must customarily and regularly perform any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee as identified in the regulations. As noted in the 2004 Final Rule, the "Department continues to find that employees at higher salary levels are more likely to satisfy the requirements for exemption as an executive, administrative, or professional employee." 69 FR 22174. Therefore, "the purpose of section 541.601 was to provide a short-cut test for such highly compensated employees who have almost invariably been found to meet all the other requirements of the regulations for exemption." *Id.* (internal quotation marks omitted). As we noted in the 2004 Final Rule, the "Department has the authority to adopt a more streamlined duties test for employees paid at a higher salary level." 69 FR 22173. We continue to believe that the existing HCE duties test is appropriate for those earning at the 90th percentile of full-time salaried workers, especially in light of the fact that the required compensation level will be routinely updated and, therefore, will remain a meaningful test.

E. Automatic Updates

As the Department noted in the NPRM, even a well-calibrated salary level that is fixed becomes obsolete as wages for nonexempt workers increase over time. Lapses between rulemakings have resulted in EAP salary levels that are based on outdated salary data, and thus are ill-equipped to help employers assess which employees are unlikely to meet the duties tests for the exemptions. To ensure that the salary level set in this rulemaking remains effective, the Department proposed to modernize the regulations by establishing a mechanism for automatically updating the standard salary test, as well as the total annual compensation requirement for highly compensated employees. The Department explained that the addition of automatic updating would ensure that the salary test level is based on the best available data (and thus remains a meaningful, bright-line test), produce more predictable and incremental changes in the salary required for the EAP exemptions, and therefore provide certainty to employers, and promote government efficiency.

The Department sought comments on two alternative automatic updating methodologies. One method would update the threshold based on a fixed percentile of earnings of full-time salaried workers. The other method would update the threshold based on changes in the Consumer Price Index for All Urban Consumers (CPI–U). The Department also proposed to automatically update the total annual compensation requirement for the HCE exemption with the same method chosen to update the standard salary test. Regardless of the method selected, the Department proposed that automatic updating for both thresholds would occur annually, but invited comment regarding whether a different updating frequency would be more appropriate. Finally, the Department proposed to publish the updated rates at least 60 days before they take effect, and invited comment regarding whether the updated rates should take effect based on the effective date of the Final Rule, on January 1, or on some other specified date. The Department received many comments in response to these proposals.

The Final Rule establishes that the Department will automatically update the standard salary level test by maintaining the salary level at the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region. The Department will update the annual compensation requirement for highly compensated employees by maintaining this level at the annualized value of the 90th percentile of the weekly earnings of full-time salaried workers nationwide. In response to commenter concerns, the Department has modified the frequency and advance-notice elements of the updating mechanisms. The Final Rule establishes that automatic updates to the standard salary level and the HCE annual compensation requirements will occur every three years on the first of the year, and that the Department will publish the updated rates in the **Federal Register** at least 150 days before their effective date, and post the updated salary and compensation levels on the WHD Web site. The first automatic update will take effect on January 1, 2020. The automatic updating provision is set forth in new § 541.607.

i. The Department's Legal Authority To Automatically Update the Salary Level

Most commenters that addressed automatic updating focused on the merits of the Department's proposal, but some discussed our authority to automatically update the salary level.[71] Commenters that opposed automatic updating discussed this issue more frequently and in much greater detail than those that favored the Department's proposal.

Organizations representing employee interests, including AFL–CIO and NWLC, asserted that the Department has authority to establish an automatic updating mechanism through notice and comment rulemaking. These commenters stated that just as the Department has authority under 29 U.S.C. 213(a)(1) to establish the salary level test, we likewise have authority to automatically update the salary level to ensure it remains effective. Several commenters emphasized that Congress has never limited the Department's ability to update the salary level. For example, EPI stated that "Congress in 1938 gave the authority to define and delimit the terms 'bona fide executive, administrative, or professional' to the Secretary of Labor and has never taken it back, except with respect to very particular occupations," and a comment from 57 labor law professors similarly stated that automatic updating is "within [the Department's] discretion and authority" because "Congress granted the agency wide discretion in implementation of the statutory language." Other commenters, including AFSCME and NELP, highlighted that automatic updating is consistent with the FLSA's purpose.

In contrast, a number of organizations representing employer interests challenged the Department's authority to add an updating mechanism. Many of these commenters, including ABC, ALFA, CUPA–HR, NRA, PPWO, and Seyfarth Shaw, stated that Congress has never granted the Department authority to institute automatic updating, and asserted that section 13(a)(1)'s silence on this issue reflects that Congress did not intend the salary level test to be automatically updated. These and other commenters stressed that whereas Congress has never amended section 13(a)(1) to expressly include automatic updating, Congress has expressly authorized indexing under other statutes. Many commenters, including the Chamber, CUPA–HR, and FMI, highlighted that Congress has never provided for automatic increases to the FLSA minimum wage, and the Chamber added that Congress has not indexed the minimum hourly wage for exempt computer employees under section 13(a)(17) of the FLSA, the cash wage for tipped employees under section 3(m) of the FLSA, or any of the FLSA's subminimum wages.

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[71] Some commenters, like the Equal Employment Advisory Council (EEAC), addressed the Department's authority to automatically update the HCE compensation requirement by noting that its reservations regarding automatic updating of the standard salary level apply equally to the Department's proposal to automatically update the HCE exemption's threshold. We do not separately address this issue since, like the standard salary level, our authority to automatically update the HCE threshold is grounded in section 13(a)(1), and the discussion in this section therefore applies equally to our adoption of a mechanism to automatically update the HCE total compensation requirement.

These comments reveal disagreement about the scope of the Department's delegated authority under section 13(a)(1) to define and delimit the EAP exemptions. The Department disagrees with the position that section 13(a)(1)'s silence on automatic updating forecloses the Department from establishing an updating mechanism. While it is true that section 13(a)(1) does not reference automatic updating, it also does not reference a salary level or salary basis test, a duties test, or other longstanding regulatory requirements. Rather than set precise criteria for defining the EAP exemptions, Congress delegated that task to the Secretary by expressly giving the Department the broad authority to define and delimit who is a bona fide executive, administrative, or professional employee. As we explained in the NPRM, since 1938 the Department has used this authority to promulgate many significant regulatory changes to the EAP exemptions, including adding a separate salary level for professional employees and a separate duties test for administrative employees in 1940, adopting separate short and long test salary levels in 1949, and eliminating the long duties test and creating a single standard salary level test and a new HCE exemption in 2004. These changes were all made without specific Congressional authorization. Despite numerous amendments to the FLSA over the past 78 years, Congress has not altered the Department's authority to promulgate, update, and enforce the salary test regulations. The Department concludes that just as we have authority under section 13(a)(1) to establish the salary level test, we likewise have authority to adopt a methodology through notice and comment rulemaking for automatically updating the salary level to ensure that the test remains effective. This interpretation is consistent with the well-settled principle that agencies have authority to " 'fill any gap left, implicitly or explicitly, by Congress.' " *Long Island Care at Home, Ltd.* v. *Coke,* 551 U.S. 158, 165 (2007) (quoting *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.,* 467 U.S. 837,843 (1984)).

That other statutes expressly provide for indexing does not alter our interpretation of the FLSA. The Department's authority to set and update the salary level test is based in the language of the FLSA, and the fact that there are indexing provisions in other statutes does not limit that authority. Moreover, three of the four non-indexed FLSA wage rates that the Chamber and other commenters referenced—the section 6(a)(1) minimum wage, the minimum hourly wage for exempt computer employees under section 13(a)(17), and the cash wage for tipped employees under section 3(m)—are set by statute.[72] In contrast, the salary level is purely a creature of regulation. Whether Congress has indexed statutorily-established rates within the FLSA does not inform, let alone undermine, the Department's authority to use notice and comment rulemaking to create a mechanism for keeping the regulatory salary level up to date.

The Department also received several comments stating that automatic updating violates section 13(a)(1)'s mandate that the Secretary define and delimit the EAP exemption from "time to time." For example, the Chamber commented that this statutory language gives "no indication that Congress wanted to put these regulations on auto-pilot," but instead supports that "Congress *wants* the Department to 'continually revisit' the Part 541 regulations" (emphasis in comment) (quoting 80 FR 38537). However, promulgating an automatic updating mechanism does not conflict with section 13(a)(1)'s "time to time" language. The salary level percentile adopted in this rulemaking reflects the Department's analysis of the appropriate line of demarcation between exempt and nonexempt workers; providing that this dividing line will continue to remain up to date over time fulfills the Department's obligation to ensure that only "bona fide" EAP workers qualify for exemption. Moreover, maintaining the salary level at the 40th percentile of salaries in the lowest-wage Census Region by updating it every three years in no way precludes the Department from revisiting this methodology from "time to time" should cumulative changes in job duties, compensation practices, and other relevant working conditions indicate that changes to the salary level calculation method may be warranted.

The Department also received several comments asserting that automatic updating violates the APA and section 13(a)(1)'s requirement that the EAP exemption be defined and delimited by regulations of the Secretary subject to the provisions of the APA. These commenters asserted, albeit on slightly different grounds, that notice and comment rulemaking must precede any salary level change. CUPA–HR emphasized that under section 13(a)(1) any updating must be done by regulation, and EEAC asserted that "the FLSA exemptions have the full force and effect of law" and the "APA requires notice-and-comment rulemaking each time an agency issues, repeals, or amends a legislative rule." NRF stated that any increase should be "based on an individualized evaluation of economic conditions rather than an automatic arbitrary formula," and several commenters stressed that the Department must consider prevailing conditions and provide for public comment before updating the salary level. *See, e.g.,* Jackson Lewis; NAM; PPWO.

The Department believes that automatically updating the salary level fully complies with the APA and section 13(a)(1). Through this rulemaking the Department is promulgating an automatic updating mechanism by regulation and in accordance with the APA's notice and comment requirements. The updating mechanism is not an "arbitrary formula," but the product of an exhaustive rulemaking process that took into consideration the views of thousands of commenters. These comments raised a wide range of relevant issues, including the impact of an updating mechanism, and greatly influenced the content of the Final Rule. For example, in response to these comments (and as discussed in detail below) the Department adopted a fixed percentile approach to automatic updating, changed the updating frequency from annually to every three years, increased the period between announcing the updated salary level and the effective date of the update from 60 days to at least 150 days, and set January 1 as the effective date for future salary level updates. As to commenter concerns about accounting for prevailing economic conditions, both the NPRM and this Final Rule contain detailed 10-year projections of the costs and transfers associated with automatic updating. *See* section VI.D.x.; 80 FR 38586–89. Moreover, maintaining the salary level at a fixed percentile of earnings will help ensure the test continues to reflect prevailing wage conditions, and does not preclude the Department from revising the updating mechanism in the future through notice and comment rulemaking if we determine that conditions warrant. We disagree with commenter statements that notice and comment rulemaking must precede every salary level update when the underlying salary setting methodology is unchanged and reject the notion that in directing the Department to define and delimit the EAP exemption by regulations, Congress intended to prohibit the Department from establishing an automatic updating mechanism through notice and comment rulemaking.

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[72] The Chamber also referenced the FLSA's subminimum wage rates. While the Secretary sets some subminimum wage rates, the FLSA establishes the existence of such rates. *See, e.g.,* 29 U.S.C. 214(a) (minimum wage for learners, apprentices, and messengers).

Relatedly, a few commenters interpreted our NPRM statement that automatic updating would remove "the need to continually revisit this issue through resource-intensive notice and comment rulemaking," 80 FR 38537, as an attempt to impermissibly circumvent the APA. *See, e.g.,* Chamber; NRA. This statement was not an attempt to sidestep the APA, but rather part of our explanation for seeking comment on the merit of using an updating mechanism to keep the salary level test current. The Department has dedicated considerable resources toward this rulemaking, including conducting extensive outreach prior to issuing the NPRM, drafting a comprehensive NPRM, receiving and reviewing more than 270,000 timely comments, and drafting a Final Rule addressing these comments. The Department recognizes and appreciates the commenters' views. We disagree, however, that section 13(a)(1) or the APA prohibits us from establishing a mechanism to keep the salary level up to date so that it continues to work effectively with the duties test. Instead, we conclude that introducing an updating mechanism that ensures that the EAP exemptions remain up to date is a reasonable exercise of the Department's statutorily-established authority to define and delimit the EAP exemptions.[73]

The Department also received several comments highlighting that in two prior rulemakings we rejected commenter requests to automatically update the salary level. Specifically, some commenters raised that in our 1970 rulemaking we stated, in response to a comment, that automatic updating would "require further study," 35 FR 884, and that we declined a similar request in 2004. *See, e.g.,* Chamber; FMI. The Department acknowledged these prior statements in the NPRM. While we agree with commenters that our decision to institute automatic updating in this Final Rule departs from our 1970 and 2004 rulemakings, these past statements in no way foreclose our current action. The 1970 rulemaking stated that the request to automatically update the salary level "appears to have some merit, particularly since past practice has indicated that approximately 7 years elapse between amendment of the salary level requirements." 35 FR 884. The time between rulemakings has increased since 1970 (this will be the third salary level update in 46 years), underscoring the merit of automatic updating. Consistent with our earlier statement that automatic updating "would require further study," the Department has proposed the addition of an updating mechanism in this rulemaking and considered the wide-range of comments received on the issue. While in the 2004 Final Rule we declined to institute automatic updating and instead expressed our intent "in the future to update the salary levels on a more regular basis, as [we] did prior to 1975," 69 FR 22171, our subsequent experience has prompted us to reexamine this matter.

Several commenters, including IFA and Littler Mendelson, specifically referenced our refusal to institute inflation-based indexing in the 2004 Final Rule. In that rulemaking we stated, in response to a comment, that "the Department has repeatedly rejected requests to mechanically rely on inflationary measures when setting the salary levels in the past because of concerns regarding the impact on lower-wage geographic regions and industries." 69 FR 22172. We then stated that such "reasoning applies equally when considering automatic increases to the salary levels" and that "the Department believes that adopting such approaches in this rulemaking is both contrary to congressional intent and inappropriate." *Id.* In its comment, the Chamber interpreted this language as expressing our conclusion "that Congress did not give the Department authority to provide automatic increases to the salary level" and stated that "the Chamber is unaware of any legislative or legal development that would justify [our purported] reversal."

These commenters' reading of the 2004 Final Rule is overly broad, as we did not conclude that the Department lacks legal authority to institute automatic updating. Our reference to automatic updating simply reflected our conclusion at that time that an inflation-based updating mechanism, such as one based on changes in the prices of consumer goods, that unduly impacts low-wage regions and industries would be inappropriate. As explained in the NPRM, closer examination reveals that concerns raised when setting a new salary level using an inflation index are far less problematic in the automatic updating context. *See* 80 FR 38540. For example, in the automatic updating context there is little risk of using an outdated salary level as a baseline for inflation-based adjustments, and the inability of inflation-based indicators to account for changes in working conditions is therefore less concerning. *See id.* Regardless, our prior concerns about inflation-based updating are not implicated here because the Department has chosen to automatically update the salary level based on a fixed percentile of earnings of full-time salaried workers. As explained in detail in section IV.A., in response to commenter concerns that setting the salary level using the 40th percentile of a nationwide data set would adversely impact low-wage regions and industries, the Department is setting the salary level at the 40th percentile of full-time salaried workers in the lowest-wage Census Region, which yields a lower salary level that will exclude fewer employees performing EAP duties in low-wage regions and industries. Tying the salary level and updating mechanism to a fixed percentile of earnings in the lowest-wage Census Region squarely addresses the concern we raised in the 2004 Final Rule, and ensures that our updating mechanism is appropriate for all areas and industries.

Several commenters, including CUPA–HR and FMI, also deemed the Department's proposal inconsistent with our statement in the 2004 Final Rule that "the Department finds nothing in the legislative or regulatory history that would support indexing or automatic increases." 69 FR 22171. But as explained in our proposal, the lack of on-point legislative history—either favoring or disfavoring automatic updating—is unsurprising given the origin and evolution of the salary level test. Congress did not set forth any criteria, such as a salary level test, for defining the EAP exemptions, but instead delegated that task to the Secretary. The Department established the first salary level tests by regulation in 1938, using our delegated authority to define and delimit the EAP exemptions. *See* 29 U.S.C. 213(a)(1). The fact that the salary level tests were created by regulation after the FLSA was enacted accounts for the lack of legislative history addressing the salary level tests or updating methods. As previously discussed, despite numerous amendments to the FLSA over the past 78 years, and the Department making many significant changes to the EAP exemptions, Congress has not altered the Department's authority to promulgate, update, and enforce the salary test regulations. We agree with commenters that instituting an automatic updating mechanism departs from the Department's past practice, but believe this is an appropriate modernization and within the Department's authority.

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[73] This approach is consistent with the Department's approach taken when issuing regulations to establish required wage rates in other programs for which we have enforcement responsibility. *See* 20 CFR 655.120 (describing method for updating adverse effect wage rates for H–2A visa program); 20 CFR 655.211 (using Employment Cost Index to update required wage for employees engaged in herding or the production of livestock under the H–2A program).

The Department also received several comments addressing the impact of automatic updating on compliance with the Regulatory Flexibility Act ("RFA") and Executive Order 13563, Improving Regulation and Regulatory Review. Seyfarth Shaw urged the Department to not proceed with automatic updating in part because this mechanism would "effectively bypass[]" these authorities. PPWO raised similar RFA concerns and characterized the Department's rulemaking as a "'super-proposal,' deciding once and for all what (in the Department's belief) is best without consideration of its impact now or in the future." PPWO further stated that "it would not be possible for the Department to accurately estimate the impact of the automatic increases in future years as the workforce and the economy are always changing."

The RFA requires a regulatory flexibility analysis to accompany any agency rule promulgated under 5 U.S.C. 553. *See* 5 U.S.C. 603–604. In accordance with this requirement, this rulemaking estimates the future costs of automatic updating using the fixed percentile approach. The RFA only requires that such analyses accompany rulemaking, and commenters have not cited any RFA provision that would require the Department to conduct a new regulatory flexibility analysis before each automatic salary level update. In response to PPWO's concern about this rulemaking setting the salary level updating process "once and for all," we reiterate that this Final Rule does not preclude further rulemaking should the Department determine that future conditions indicate that revisions to the salary level updating methodology may be warranted.

Similarly, Executive Order 13563 directs agencies to take certain steps when promulgating regulations, including using the "best available techniques to quantify anticipated present and future benefits and costs as accurately as possible" and adopting regulations "through a process that involves public participation." 76 FR 3821 (Jan. 18, 2011). The current rulemaking fully satisfies all aspects of Executive Order 13563, *see* section VI; 80 FR 38545, and commenters have cited no portion of this directive that would require notice and comment rulemaking to precede future automatic salary level increases made through the updating mechanism established in this rulemaking.

Finally, Fisher & Phillips and the Southeastern Alliance of Child Care Associations stated that because the Department did not propose specific regulatory text concerning automatic updating, "adoption of any such indexing mechanism would be unlawful and without effect" under the APA. These commenters did not specify the provision of the APA that is purportedly violated. The APA requires that the notice of proposed rulemaking published in the **Federal Register** include either the terms or substance of the proposed rule or a description of the subjects and issues involved. *See* 5 U.S.C. 553(b)(3). The Department's proposal fully satisfies this standard, which does not require the NPRM to "contain every precise proposal which (the agency) may ultimately adopt as a rule," much less the specific regulatory text. *Ethyl Corp.* v. *EPA,* 541 F.2d 1, 48 (D.C. Cir. 1976) (en banc) (internal quotation marks and citations omitted). The proposed regulatory text for each exemption states that the salary level will be updated annually (on a to-be-determined date) and that the Department will publish a notice with the updated levels at least sixty days before these rates become effective. *See* 80 FR 38610–11. The proposal also explains why, rather than propose regulatory text for a specific updating method, the Department sought comments on two alternatives (each of which we discussed in depth). *See* 80 FR 38539. The Department's NPRM fully satisfies the APA.

ii. Rationale for Automatically Updating Salary Levels

The Department proposed to establish automatic updating mechanisms to ensure that the standard salary test and the HCE total annual compensation requirement remain meaningful tests for distinguishing between bona fide EAP workers who are not entitled to overtime and overtime-protected white collar workers, and continue to work effectively with the duties tests. The Department's proposal explained that this change would ensure that these thresholds are based on the best available data and reflect prevailing salary conditions, and will produce more predictable and incremental changes in the salary required for the EAP exemptions. The Department received numerous comments addressing our automatic updating proposal.

Commenters were sharply divided over whether the Department should automatically update the salary level.[74] Employees and commenters representing employee interests overwhelmingly supported this change, while most employers and commenters representing employer interests opposed automatic updating. Overall, those supporting automatic updating generally agreed with the Department's rationale presented in the NPRM and emphasized the benefits to employees and employers of maintaining an up-to-date salary level, while those in opposition challenged the Department's rationale and emphasized the burdens annual updating would impose on employers. Several employers favored automatic updating, but requested that updates occur less frequently than on an annual basis. Additionally, some commenters that opposed automatic updating nonetheless expressed a preference for a particular updating methodology should the Department go forward with this aspect of our proposal.

Commenters that supported automatic updating focused primarily on the benefits of maintaining an up-to-date salary level. Many commenters agreed with the Department's proposal, stating that automatic updating is a transparent way to maintain an effective salary level and avoid the negative effects of infrequent salary level updates. For example, NELP stated that automatic updating "is by far the most reasonable, efficient and predictable way to ensure that the standard for exemption remains true to the statute's intended purposes," AFL–CIO stated that a "transparent updating process would provide greater certainty and predictability for employers and workers alike," and

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[74] Relatively few commenters specifically addressed the proposal to automatically update the HCE total annual compensation level, and those that did generally stated that their views mirrored their comments on the proposal to automatically update the standard salary level. Accordingly, this discussion focuses on the standard salary level but also applies to the Department's adoption of an automatic updating mechanism for the HCE compensation requirement.

Bend the Arc, Employment Justice Center, Maintenance Cooperation Trust Fund, and several other worker advocacy groups stated that indexing "the salary threshold to an objective measure provides a predictable and efficient way to ensure that those workers intended to be covered by the [FLSA] get its protections." Many other commenters made similar statements. *See, e.g.,* AARP; AFT; EPI; the Gillespie Sanford law firm; Labor and Employment Committee of the National Lawyers Guild-New York City Chapter; NWLC.

Commenters supporting automatic updating also frequently discussed, and viewed the Department's proposal as a solution to, the Department's past inability to regularly update the salary level. These commenters emphasized that automatic updating would increase predictability in both the frequency and size of salary level changes, benefiting employers and employees. *See, e.g.,* Comment from 57 labor law professors; AFL–CIO; Partnership. Several commenters representing employer interests viewed automatic updating as a means of producing more predictable salary level changes. *See, e.g.,* American Council of Engineering Companies; CVS Health. Similarly, SIGMA supported automatic updating because "[s]udden, large adjustments to the threshold without warning can cause dislocation in the industry, increase compliance costs, and provide disincentives to employing people on a salaried rather than an hourly basis." ANCOR stated that "steadier, more predictable" salary level changes would "likely benefit providers who will be able to adjust to smaller, more frequent changes better than to larger, less frequent ones."

Some commenters that supported automatic updating, including Athens for Everyone, NELA, Rudy, Exelrod, Zieff & Lowe, and many others, stressed that a fixed salary level harms employees because inflation causes the salary threshold's real value to decline over time. AFSCME submitted campaign comments from 24,122 of its members who agreed that "overtime protections have been eroded by inflation," and highlighted the "need to index these protections to keep them from being eroded again in the future." NELA and Rudy, Exelrod, Zieff & Lowe also stated that this decline particularly harms workers earning just below the fixed salary level when it is first set, because they will "soon see that figure fall below their salary" and lose overtime protection even if "the real value of their salary stays entirely constant." Likewise, Nichols Kaster stated that infrequent salary level updates have harmed workers earning just above the salary threshold when it is first set, as these workers have "no protection against working long hours for diminishing returns."

A number of commenters also raised the related view that automatic updating would decrease inappropriate classification of lower salaried white collar employees as exempt. AFGE, IAFF, and others noted that the salary level's effectiveness at distinguishing between exempt and nonexempt workers diminishes over time as the wages of employees increase and the real value of the salary threshold falls. SEIU and a number of worker advocacy groups, including Equal Justice Center, NDWA, and Texas RioGrande Legal Aid, asserted that infrequent salary level updates have permitted employers to sweep too many low-salaried workers into the exemption, with NELP citing the proximity of the current salary threshold to the poverty level as a "potent example" of how the "current method of setting fixed levels results in outdated thresholds and ballooning numbers of workers improperly subject to employer classification as exempt." Some commenters, including AFL–CIO and UFCW, asserted that failing to regularly update the standard salary level also exposes growing numbers of workers who fail the standard duties test to the "risk of misclassification."

The Department received numerous comments from employers and groups representing employers opposing the introduction of an automatic updating mechanism. These commenters raised a variety of concerns and urged the Department not to finalize this aspect of our proposal. Consistent with how many commenters organized their comments, these views are aptly separated into two broad categories: Those addressing whether automatic updating is appropriate as a general matter, and those discussing potential financial and administrative effects of automatically updating the salary levels on an annual basis. Both of these broad categories of comments are discussed below.

Some commenters cited the Department's past refusal to institute automatic updating and emphasized that the part 541 regulations have benefited from the rulemaking process. For example, the Chamber, FMI, and others stated that rulemaking has generated vigorous public debate about the salary levels, and that the Department has increased and decreased proposed salary levels in response to public comment—including in 2004 when the Department increased the proposed salary level and HCE compensation requirements in our final rule. PPWO stated that the "Department's own actions in reaching out to the regulated community before publication of the NPRM, as well as soliciting input on the salary level in the NPRM itself, demonstrate the importance of notice-and-comment on the salary level."

Many commenters stated that the Department should only update the salary level when conditions warrant, not automatically. CUPA–HR commented that the rates of increase and the duration between updates have always varied as the Department has tailored the salary levels "to ensure that the exemptions remained true to their purpose in the face of changing workforces and changing economic circumstances." NGA cited the statement in the 2004 Final Rule that "salary levels should be adjusted when wage survey data or other policy concerns support such a change," 69 FR 22171, and stated that the Department should only change the salary level when changes in earnings are substantial. Similarly, AH&LA, Island Hospitality Management, NCCR, and NRF all stated that a salary increase "should be based on an individualized evaluation of economic conditions rather than an automatic arbitrary formula." Other commenters expressed similar views. *See, e.g.,* Agricultural Retailers Association and the Fertilizer Institute; National Council of Farmers Cooperatives. PPWO contended that the salary level needs to be "fixed" only "when it approaches the end of its usefulness." EEAC and Fisher & Phillips stated that the Department could simply reallocate resources as necessary to maintain an appropriate salary level without automatic updating.

Several commenters raised the related concern that automatic updating could harm the economy by increasing the financial burden on employers during economic downturns. The Chamber stated that either proposed updating method would be slow to reflect actual economic conditions, and would prevent employers from "lowering salaries to quickly respond to decreased revenue experienced in bad economic times." Fisher & Phillips stated that automatic updating during periods of high inflation could "contribute to a serious inflationary spiral." Analogizing to the minimum wage context, CalChamber Coalition stated that automatic updates during economic downturns may lead employers to reclassify more employees as nonexempt, reduce hours, and increase layoffs.

Some commenters worried that automatic updating would create an untenably high salary level that would harm low-income regions and industries, and small businesses. For example, Alpha Graphics stated that automatic updating would produce "an inappropriately high level in a matter of a few years," and NGA stated that salary level increases would harm independent grocers with low profit margins because the updating mechanism "would not provide the necessary protection for low-wage industries and geographic areas." *See also, e.g.,* ALFA; NFIB. SHRM expressed concern that automatic updating based on a national salary level would not account for the fact that salaries in all regions and industries do not rise at the same pace, and it questioned whether the Department could realistically use additional rulemaking to correct for regional disparities that may arise in the future.

Several commenters asserted that updating is problematic regardless of the updating method the Department chooses, with some suggesting that the salary level and automatic updating are incompatible concepts. Seyfarth Shaw stated that any updating method "would establish an ad hoc, artificially-created level determined by statistical assumptions." *See also* Wendy's (describing the updating methods as "based on untested and complicated methodologies"). EEAC expressed concern that if the salary-setting methodology in this rulemaking results in an incorrect salary level (as the Department now states was the case in 2004) automatic updating would compound this error indefinitely. NACS, the Southeastern Alliance of Child Care Associations, and others stated that establishing an automatic updating mechanism is inconsistent with the Department's recognition that "the line of demarcation" provided by the salary test "cannot be reduced to a standard formula."

As to the effect of automatic updating on salary level predictability, PPWO stated that "it will be difficult, if not impossible, for employers and employees to determine with precision each year's new salary level in advance of the Department's pronouncement in the **Federal Register**," and AIA–PCI and the Clearing House Association agreed that this uncertainty is demonstrated by the Department's statement in the NPRM that "the public will not be able to exactly replicate the weekly earnings and percentiles" used to calculate the salary level, 80 FR 38528 n.24.

The Department recognizes that our automatic updating proposal has elicited strong and diverse reactions from stakeholders. After review of submitted comments, the Department remains convinced that instituting an automatic updating mechanism is the best means of ensuring that the salary level test continues to provide an effective means of distinguishing between overtime-eligible white collar employees and those who may be bona fide EAP employees, and continues to work appropriately with the duties test.

The Department shares commenters' concerns that a fixed and outdated salary level increases the number of low-salaried employees at risk of being inappropriately classified as exempt as the real value of the salary threshold falls, and that workers earning near the fixed salary level when it is set are particularly vulnerable. The Department also agrees with commenters that the updates to the salary level should reflect prevailing economic conditions. The Department's updating mechanism directly addresses both of these issues by ensuring that the salary test level is based on the best available data and reflects current salary conditions. As explained in more detail below, the Department will use the updating mechanism established under new § 541.607 to reset the salary level using the most recent BLS data on earnings for salaried workers. Linking the salary level to earnings ensures that economic changes that impact employee salaries are reflected in the salary level test. Also, because regular updates will ensure that the salary level is in step with prevailing economic conditions, the Department does not believe that the updating mechanism will lead to undue salary level increases during economic downturns or other inopportune times. Salary level changes will occur at regular intervals using a set methodology and a publicly available data source. This improvement to the current regulations will benefit employers and employees by replacing infrequent, and thus more drastic, salary level changes with gradual changes occurring at predictable intervals.

The Department is committed to ensuring that the updating mechanism yields a salary that is appropriate for low-wage industries and geographic areas. As previously discussed in section IV.A.iv., in response to commenters' concerns, the Department is setting the salary level at the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (currently the South). Commenters raised similar concerns about using a nationwide data set for automatic updating. The reasons that supported changing from a national to a regional data set in the standard salary level setting context apply equally in the salary updating context, and new § 541.607 accordingly incorporates this data set change.[75] The Department recognizes that salaries do not change at the same rate nationwide, and this modification will ensure that any future increase in earnings will only impact the standard salary level to the extent that those gains are also realized by employees in the lowest-wage Census Region. This change will also further guard against commenter concerns that using a nationwide data set could lead to a standard salary level increase that does not reflect the prevailing economic climate.[76]

Experience has shown that the salary level test is only a strong measure of exempt status if it is up to date, and that left unchanged the test becomes substantially less effective as wages for overtime-protected workers increase over time. As we explained in the NPRM, competing regulatory priorities, overall agency workload, and the time-intensive nature of notice and comment rulemaking have all contributed to the Department only having updated the salary level once since 1975 (in 2004). In the 2004 Final Rule the Department expressed the intent to "update the salary levels on a more regular basis," 69 FR 22171, yet more than a decade has passed since the last update. While some commenters viewed this inaction and the Department's past decision not to institute automatic updating as reason for withdrawing our current proposal, we believe this history underscores the appropriateness of adding an automatic updating provision to the regulations.

Contrary to several commenters' concerns, prior Department statements about the salary level test in no way undermine the Department's decision now to incorporate an automatic updating mechanism into the regulations. The Department's statement that the "line of demarcation" between exempt and nonexempt employees "cannot be reduced to a standard formula," 80 FR 38527, simply reflects our continued belief that no single formula can unerringly separate exempt and nonexempt employees, and that the salary test must therefore work in tandem with the duties test for the EAP exemption to function effectively. The salary level test remains the "best single test" of exempt status, Stein Report at 19, and the method for setting and updating the salary level adopted through this rulemaking represents the Department's best determination of the appropriate dividing line between exempt and nonexempt workers, when paired with the standard duties test. While the precise updating "formula" chosen—the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region—is new, the underlying methodology is broadly consistent with the Department's past salary setting methods, *see* section IV.A.i., and the salary setting and updating methodology have been promulgated through notice and comment rulemaking.

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[75] Similarly, for the same reasons that the Department declines commenter requests to institute a special salary level for non-profit employers, we also decline to exempt non-profit employers from automatically updated salary levels.

[76] As explained in section IV.D., as in the 2004 Final Rule, the Department is using a nationwide data set to set the HCE compensation level in this rulemaking, and we will use nationwide data to update the HCE compensation level. The use of nationwide data is necessary to ensure that overtime-eligible workers in high-wage areas are not inappropriately exempted based upon the HCE exemption's minimal duties test.

The Department agrees with commenters that stated that automatic updating will increase predictability in both the frequency and size of salary level changes, benefiting employers and employees alike. We find to be unfounded comments that salary level unpredictability is evident from our statement that "the public will not be able to exactly replicate the weekly earnings and percentiles [used to calculate the salary level] from the public-use files made available by BLS." 80 FR 38528 n.24. This explanatory footnote addressed the public's ability to duplicate BLS' deciles table using the public-use data. The referenced discrepancy is very small, and in no way compromises the public's ability to estimate future salary level changes based on the trend in quarterly earnings data published by BLS.[77] As discussed in the NPRM and above in section IV.A.iv., the Department will update the salary level using the deciles table for Census Regions as published by BLS, without modifying the data in any way or otherwise engaging in complex data analysis. This process is transparent, predictable, and straightforward.

The essentially ministerial act of applying the updating mechanism to maintain the salary level underscores why the Department does not share commenter concerns about resetting the salary level without further rulemaking. The Department agrees with commenters that past salary level changes have benefited from (and required) notice and comment rulemaking. This rulemaking is no exception, as public feedback was critical to finalizing the new standard salary level and the automatic updating mechanism. In response to public comments, the Department has changed the data set used for setting and updating the salary level, and (as discussed in greater detail below) chosen to update the salary using the "fixed percentile" approach, increased the period between notice of the updated salary level and its effective date, and changed the updating frequency. But unlike salary updates made up to this point, which have all involved some change to the salary setting methodology, salary level updates under new § 541.607 will use a fixed methodology that (through this rulemaking) has already been subject to notice and comment. Public feedback was critical to finalizing the updating mechanism, but is unnecessary when simply maintaining the salary level using this mechanism. Of course, should the Department choose to make any changes to the updating methodology in the future, such changes would require notice and comment rulemaking.[78]

The Department also disagrees with commenters that stated that we should simply reallocate agency resources as necessary to maintain an updated salary level. Whereas most regulations require a one-time expenditure of resources to promulgate, and then once issued can remain both unchanged and forceful for many years if not decades, without automatic updating the Department would have to engage in nearly continuous rulemaking to ensure that the salary test accurately reflects employee salary levels. The new automatic updating mechanism will enable the Department to maintain an effective and up-to-date salary level, while preserving our ability to revisit the underlying salary setting methodology through rulemaking as future conditions warrant. For the above reasons, the Department is finalizing our proposal to institute a regulatory mechanism for automatically updating the salary level.

The Department received many comments expressing concern about the financial and administrative burden that annual updating would impose on employers. In particular, many commenters stated that annual updating would require employers to conduct a yearly "classification analysis"—to assess employee exemption status and determine whether salary increases to preserve exempt status are warranted—and then incur additional costs implementing any changes. AIA–PCI; *see also, e.g.,* Business Roundtable; Maryland Chamber of Commerce; PPWO. Several commenters described these costs in detail. For example, the Chamber's comment identified many common concerns:

> The annual salary increase proposed by the Department will require an employer to: Analyze whether business conditions allow a salary increase or whether they need to reclassify employees as non-exempt; prepare new compensation plans for reclassified employees; develop materials to explain the reclassification to employees; review timekeeping and payroll systems to ensure compliance with the FLSA recordkeeping requirements and compliant overtime calculations; review or adopt new policies for the reclassified employees, including policies prohibiting off-the-clock work, when employees will be permitted to work overtime, payment for waiting time, training time and travel time, etc.; train the reclassified employees, and the managers who supervise them on recording time and other wage-hour topics. If the salary change is implemented as proposed, a large number of workers will have to be added to timekeeping systems. This may require server and system upgrades to account for the additional users. Best practices take time.

Additionally, ABA stated that automatic updating would require employers to consider whether to restructure the duties of newly nonexempt employees, and NFIB stated that it would require employers to annually "reassess potential raises, bonuses, or promotions" for employees. Seyfarth Shaw and others stated that the Department significantly underestimated the cost and time obligations associated with these actions.

Multiple commenters also emphasized that annual updating would negatively impact employer budgets and budget planning. NALP, NGA, NRF, Wendy's, and others stated that not knowing employee exemption status from year to year would make it more difficult for employers to forecast costs or profit margins. CUPA–HR stated that in response to a survey of its members about the Department's proposal, 91 percent of respondents stated that automatic updating as proposed would negatively impact their budgets, while 63.6 percent said this change would negatively impact financial planning ability. The California State Association of Counties stated that annual updating would be especially hard for public entities because "public sector salaries are generally not as flexible as private sector salaries and have many additional constraints, including bargaining agreements, restricted sources of revenue, and civil service rules." Similarly, several commenters stated that updating would be particularly difficult for non-profit employers that have limited ability to increase revenue in response to increased labor costs. *See, e.g.,* American Academy of Otolaryngic Allergy; BSA; USPIRG. WorldatWork stated that budget overruns resulting from annual salary increases could deplete capital available for other business areas such as research and development, business equity for future growth, or voluntary employer contributions to retirement plans, and FMI stated that budgetary uncertainty and the "specter of unexpected cost increases provides disincentives for businesses to engage in capital spending and increase hiring and thereby grow the economy."

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[77] As we noted in the NPRM, to ensure the confidentiality of survey respondents the data in all BLS public-use files use adjusted weights and therefore minor discrepancies between internal BLS files and public-use files exist. *See* 80 FR 38528 n.24. This means that the public will be able to estimate future salary levels based on BLS' regularly published regional deciles, but will not be able to precisely recreate the salary amounts in the published deciles due to minor adjustments in the publically available data.

[78] Additionally, and as acknowledged in the NPRM, 80 FR 38522, the Department will consider conducting a retrospective review of this Final Rule at an appropriate future time. *See* Executive Order 13563 (Jan. 18, 2011); *see also* 5 U.S.C. 610.

Several commenters expressed concern that updating could create "salary compression" issues and impede employers' ability to give merit-based salary increases. To illustrate these interrelated concerns, SHRM provided a hypothetical in which ten exempt employees earn $975 per week (above the 2016 salary level of $970 predicted in the NPRM), and an employer budgets for a three percent annual salary increase (totaling $15,210). SHRM contended that without automatic updating the employer could reward better performing employees with large raises and give lower raises or no raise to average or poor performers. If, however, the salary level were automatically increased by two percent, the employer "would be required to adjust all ten salaries up to $989 per week in order to maintain their exempt status," significantly reducing the total amount available for merit increases. SHRM concluded that after several automatic updates "the gap in pay between more senior and less senior, more experienced and less experienced, or more productive and less productive employees will become smaller over time, creating significant morale problems and other management challenges." AIA–PCI stated that automatic updating would in many instances place "an artificial obligation on the company to provide a salary increase to an underperforming employee . . . simply to maintain the employee's exempt status," and NGA stated that if "managers know they will receive an automatic raise each year by meeting minimum performance standards, they have little incentive to work increased hours and take on more responsibility while also maintaining a high performance level." Relatedly, several commenters, including IFA, Littler Mendelson, and Fisher & Phillips, stated that in addition to raising employee salaries to maintain their exempt status, employers will have to raise the salaries of those earning above the salary threshold to avoid compression in compensation scales among exempt employees.

Some commenters stated that automatic updating would also adversely impact employees. AH&LA, NRF, and others stated that annual updating would create instability in employee compensation and benefits (which are often tied to exempt status) and that employers would likely reduce exempt employee benefits to cover annual updating's administrative costs. Similarly, AT&T stated that uncertainty about employees' year-to-year exemption status will likely cause companies to "hedge against unanticipated overtime payments, thereby putting downward pressure on annual salary increases." Other commenters stated that possible changes in exempt status and employers' inability to provide merit increases will undermine employee morale. *See, e.g.,* CUPA–HR; Seyfarth Shaw. IFA asserted that such complexities illustrate that an automatic updating mechanism is inconsistent with the President's directive to "modernize" the EAP regulations.

The Department acknowledges employers' strong views on the financial and administrative considerations associated with annual automatic updating, and we agree that updating the salary level annually may increase the impact on employers. In particular, we agree that this change may require employers to reassess employee exemption status more frequently and in some instances to more closely monitor hours of newly overtime-eligible employees. These costs are discussed in greater detail in the Department's economic impact analysis, *see* section VI.D.x. However, the link between automatic updating and other costs commenters have raised is less clear and was generally not supported by data in the comments. Moreover, many commenters did not address the fact that the alternative to automatic updating is not a permanent fixed standard salary level, but instead larger changes to the standard salary level that would occur during irregular future updates.

The Department believes that in several respects commenters overstated the impact of automatic updating on employers. In some instances commenters failed to account for existing employer practices. For example, the concern that automatic updating will require employers to develop policies and trainings to explain reclassification to newly overtime-eligible employees ignores that employers already have overtime-eligible employees and thus typically have these procedures in place. Additionally, many commenters conflated the distinction between costs associated with the current salary increase (to $913), and those due to future automatic updates. For example, the cost of adding newly overtime-eligible workers to timekeeping systems and reviewing timekeeping and payroll systems to ensure compliance with FLSA recordkeeping requirements are likely overstated. These costs are primarily incurred when employees are initially reclassified, and the Department predicts that the number of reclassified employees at future updates will be much smaller than the number reclassified at the initial salary increase since the updating mechanism will change the salary level regularly and incrementally, and the salary level is based on actual wages of salaried workers.

The Department is also not persuaded that automatic updating (at any frequency) will force employers to reward underperforming employees, impede merit-based pay increases, or create salary compression issues. These interrelated concerns arise from the faulty premise that the automatic updating mechanism will in effect require employers to increase salaries of all affected workers. This is not the case as employers have many options for managing their workforces. The updating mechanism simply adjusts the salary level to ensure that it reflects prevailing salary conditions and can effectively work in combination with the duties test to identify exempt and nonexempt employees. Because any increase in the salary level is based on actual increases in workers' salaries, employers may find that they are already paying their exempt employees wages above the updated salary level. Where this is not the case, employers can respond to salary level updates by (for example) increasing employee pay to retain overtime exempt status, reclassifying employees to overtime-eligible status, decreasing hours of newly overtime-eligible employees to avoid overtime, paying overtime to newly overtime-eligible workers, redistributing hours among the workforce, and/or hiring new employees. Similarly, employers are under no obligation to reward underperforming employees with a raise (a concern discussed in a number of comments). Employers can reclassify such employees to nonexempt status, redistribute employee workloads, or take any number of other managerial actions in lieu of increasing their salary to maintain the exemption.

The Department is more persuaded by commenter concerns that *annual* updating would inject uncertainty into the annual employer budgeting process. While the ripple effects of this uncertainty on employee compensation are open to debate, the immediate impact on employers is clear. Although commenters often raised budgeting concerns as part of their general opposition to automatic updating, closer examination reveals that these concerns are closely linked to the updating frequency. For example, comments that updating would impact employers' ability to forecast profit margins, determine store and supply chain labor costs, and plan and implement yearly salary increases, are all most directly implicated by annual updating, as are government and non-profit commenter concerns tied to the lack of short-term control over revenue streams and employee costs. Even some of the commenters that opposed automatic updating agreed that lengthening the period between updates would help alleviate some employer concerns. *See, e.g.,* CUPA–HR (updating every five years "could avoid many of the negative consequences associated with automatic annual increases"); BSA. Accordingly, the Department is modifying our proposal, which would have updated the salary level annually.

Commenters that favored automatic updating often also favored annual updates. *See, e.g.,* Nichols Kaster; UFCW. Commenters that opposed automatic updating expressed more varied opinions. AT&T, CUPA–HR, SIFMA, and others favored updating no more frequently than every five years, with some noting that this was the shortest interval between the Department's past salary level updates (since 1940). Notably, several of the commenters representing employer interests that supported some form of automatic updating favored revisiting the salary level every three years, *see* American Council of Engineering Companies; American Resort Development Association; WMATA, as did several commenters that opposed updating generally, *see* BSA (no more than every two or three years); Fisher & Phillips ("not less than every three years"). Other commenters favored other updating periods. *See, e.g.,* Association of Regional Center Agencies ("no more frequently than biennially").

In response to commenter concerns about the burdens of annual updating, and mindful of the range of views expressed on the appropriate updating frequency, new § 541.607 provides that updating will occur every three years. This change from the Department's proposal strikes an appropriate balance between ensuring that the salary level remains an effective "line of demarcation" and not burdening employers or their workforces with possible changes to exemption status on a yearly basis. Increasing the time period between updates will also decrease the direct costs associated with updating because regulatory familiarization costs are only incurred in years in which the salary is updated and the number of affected workers will drop in years in which the salary is unchanged leading to lower managerial costs in those years. Triennial updates using a fixed and predictable method should significantly mitigate the annual budget planning concerns that commenters raised. Additionally, employers will always know when the salary level will be updated, and between updates can access BLS data to estimate the likely size of this change. Lengthening the updating frequency to three years also responds to commenter concerns that minor year-to-year fluctuations in employee earnings should not trigger reclassification analyses.

iii. Automatic Updating Method

The Department's proposal discussed and requested comments on two alternative updating methodologies—updating using a fixed percentile of full-time salaried employee earnings or using the CPI–U. As we explained in our proposal, the fixed percentile approach would allow the Department to reset the salary level test by applying the same methodology proposed to set the initial salary level, whereas the CPI–U approach would update the salary amount based on changes to the CPI–U—a commonly used economic indicator for measuring inflation. The Department's proposal did not express a preference for either updating method and instead sought comments on these two alternatives.

The Department received numerous comments addressing these two proposed updating methods, although many commenters that supported automatic updating did not express a methodology preference. *See, e.g.,* AARP; American Association of University Women; Legare, Atwood & Wolfe law firm; Santa Clara County Probation Peace Officers' Union. Commenters that favored automatic updating and expressed a preference for a methodology generally preferred the fixed percentile approach, although some favored the CPI–U method. Both of these groups of commenters preferred either method to no automatic updating. Commenters that opposed any form of automatic updating generally expressed concerns with both updating methods. In some instances, however, these commenters preferred a particular method (typically the CPI–U) should the Department institute automatic updating. Additionally, a few commenters suggested automatic updating methods not included in the Department's proposal.

The majority of commenters that supported automatic updating and expressed a methodology preference favored the fixed percentile approach. Many of these commenters explained that the reasons for initially setting the salary level at a fixed percentile of earnings of full-time salaried workers also supported updating using the same method. For example, NWLC stated that just as the Department determined that "looking to the actual earnings of workers provides the best evidence of the rise in prevailing salary levels and, thus, constitutes the best source for setting the proposed salary requirement," 80 FR 38533, automatic updating should be based on changes in earnings rather than changes in prices. AFGE, EPI, IWPR, NEA, and many others agreed that salary level updates should reflect changes in wages and not prices, and thus favored updating using a wage index (*i.e.,* the fixed percentile approach) rather than a price index (*i.e.,* the CPI–U). NELP, the Partnership, and others added that a wage index is more appropriate because wages are less volatile than prices and increase in a more consistent and predictable fashion.

Commenters that favored the fixed percentile approach also highlighted the link between wages and the EAP exemptions' purpose and function. NELP stated that using a wage index is consistent with the fact that the exemptions are intended to cover higher-paid employees in the workforce, and NELA stated that this method reflects "the fact that the EAP exemption is, in many respects, premised on an employee's relative position in the workplace" and "is the fairest way to maintain consistency in workers' FLSA eligibility in light of inevitable economic change."

Of the relatively few commenters representing employer interests that supported some form of automatic updating, several favored the fixed percentile method. For example, SIGMA (which favored automatically updating a salary level based on the 2004 method every three to five years) stated that this approach "will help the threshold keep pace with actual wage changes in the market," while an inflation-based index "will risk harming workers and businesses" because inflation and wages "can increase at very different rates." Printing Industries of America and at least eight of its member businesses agreed that "[a]ny indexing should reflect wage changes." Similarly, CVS Health and several non-profit commenters (which incorporated or referenced a comment submitted by ANCOR) favored the fixed percentile approach over the CPI–U, provided in part that the Department account for regional salary level disparities and update the salary level on a less frequent basis than annually.

Most commenters representing employers opposed any form of automatic updating, and many of these commenters strongly opposed automatic updating using the fixed percentile method. The predominant concern among commenters that opposed the fixed percentile approach was that this method would produce drastic increases in the salary threshold level arising from the updating method itself, rather than from market forces. Some of these commenters predicted that employers will respond to each salary level update by converting all or a certain percentage of all full-time salaried employees earning below the new EAP salary level to hourly status. *See, e.g.,* Dollar Tree; HR Policy Association. Others predicted employers would convert all or a certain percentage of affected employees (*i.e.,* those EAP employees earning between the old and new salary levels) to hourly status. *See, e.g.,* Chamber; FMI; Jackson Lewis; NAM; Small Business Legislative Council. Both of these groups of commenters stated that such conversion would decrease the number of salaried workers in the CPS data set by removing those at the lower end of the salary distribution, which would produce an upward shift (or "ratcheting") of the salary level with each successive update. CUPA–HR, Fisher & Phillips, and others further stated that if employers increase employee salaries to preserve exempt status, this would apply further upward pressure on the 40th percentile, and CUPA–HR and Seyfarth Shaw added that this effect would also occur to the extent employers paid overtime to newly nonexempt salaried workers but did not convert them to hourly pay.

Given these predictions, several commenters estimated the impact that automatic updating using the fixed percentile approach would have on the salary level. Many stated that salary level growth would far exceed the 2.6 percent average annual growth rate for the 40th percentile of full-time salaried workers' weekly earnings that the Department estimated occurred between 2003 and 2013, 80 FR 38587. *See, e.g.,* IFA; Littler Mendelson; Seyfarth Shaw. Other commenters, including the Chamber and FMI, submitted an Oxford Economics letter (prepared for the NRF) which projected that by 2016 annual updating would produce a salary level of approximately $1,400 per week assuming all salaried employees below the standard salary level would be converted to hourly. The Chamber and PPWO referenced (but did not submit) an article from Edgeworth Economics, an employer consulting firm, which stated that if 25 percent "of the full-time nonhourly workers earning less than [the 40th percentile salary level] were re-classified as hourly workers," after five annual updates the salary level would equal $72,436 annually ($1,393 per week). Other commenters provided their own projections of salary level test growth. For example, WorldatWork stated that after five annual updates the salary level would reach $233,217, and HR Policy Association stated that if "the bottom 20 percent of salaried employees" are converted to hourly status the salary level would increase on average by 18 percent per year over five years. Such projections led several commenters to conclude that automatic updating using the fixed percentile approach would render the duties test increasingly obsolete and in effect eliminate the availability of the EAP exemptions in many regions and industries. *See, e.g.,* NRA; Seyfarth Shaw. ABA captured the views of several employer representatives in stating that, because of concerns that the fixed percentile method would unduly accelerate salary level test growth, automatic updating using the CPI–U is a "less harmful approach to a bad idea." *See also* NRA.

Most commenters representing employee interests did not discuss whether automatic updating using the fixed percentile approach would lead employers to convert large numbers of newly nonexempt employees to hourly status. One exception was EPI, which stated that employer projections of accelerated salary growth due to mass conversion of employees to hourly pay were inaccurate because they underestimated employee bargaining power by failing to account for low unemployment rates and the fact that "nominal wages are 'sticky,' meaning that employers rarely will lower them." EPI added that employers will have a difficult time converting salaried workers to hourly status because the new salary level will "establish a clearly observable new norm in the workplace" and so it will "be obvious to employees that any reclassification will be done to disadvantage them." For these reasons, EPI concluded that the "wholesale reclassification of current salaried workers to hourly status . . . seems an unlikely outcome."

While employer commenters that opposed the fixed percentile approach generally focused on the concerns discussed above, some commenters also objected to this approach based on the same concerns they raised with respect to the underlying salary level. Commenters criticized the CPS data set, *see, e.g.,* Fisher & Phillips, expressed concern that the proposed methodology results in too high a salary level for low-wage areas, *see, e.g.,* ACRA, and asserted that updating using the same methodology would "compound the Department's error," *see* PPWO, in setting the salary level. These commenters opposed any form of automatic updating, but deemed the fixed percentile method particularly troubling.

The Department also received many comments from organizations and individuals favoring automatic updating using the CPI–U. Overall, these commenters addressed this issue in less detail than those that favored the fixed percentile approach, often only stating that the salary level should be updated based on inflation. While the majority of these comments favoring updating using the CPI–U came from individuals, a few employers and commenters representing them also supported this approach. For example, HMR Acquisition Company favored indexing the salary level to inflation (provided the Department also lowers and phases in the new salary level requirement). Many individual commenters also recommended updating using the CPI–U. For example, one human resources professional suggested increasing the salary biennially "with the national rate of inflation," another human resources professional favoring this method stated that changes in the CPI–U are "smaller and easier for employers to absorb," and one individual stated that updating using the CPI–U "will make sure that the rises in the salary level and highly compensated level will mirror economic changes, rather than create a base percentile change yearly that may or may not work for all regions of the country." Board Game Barrister stated that updating using the CPI–U "is both predictable and fair in preventing erosion of the salary test," while the Illinois Credit Union League stated that credit unions are "familiar with the CPI–U and utilize this standard when considering salary increases."

As previously discussed, among commenters representing employer interests that opposed any form of automatic updating, concerns that the fixed percentile approach would quickly escalate the salary level led some commenters to reluctantly prefer the CPI–U. However, these commenters often stressed that they only preferred this method if the Department refused to withdraw the automatic updating proposal, and they generally did not provide any additional grounds for supporting use of the CPI–U as an updating mechanism. The Colorado Youth Corps Association and Firehouse Subs appeared to support automatic updating using the CPI–U provided that the Department set the initial salary level lower. NRA (which opposed either updating method) provided similar qualified support, stating that "for CPI–U indexing to be considered reasonable, the salary level itself needs to be reasonable."

Other commenters representing employer interests that opposed any form of automatic updating provided reasons not to update the salary level using the CPI–U. The Chamber, FMI, and others stressed that prices and salaries are only correlated in the long-run. Seyfarth Shaw opined that the "CPI–U is a volatile index" and that the basket of goods used to calculate the CPI–U is "not tied in any direct way to employees' wages rates" and is "not an appropriate indicator of wage growth (or decline)." Relatedly, ACRA stated that the fact that there have "been periods where the CPI–U has outpaced wages and other periods where wages have grown faster than CPI–U" illustrates that the CPI–U is "an unreliable benchmark for wages."

Several commenters worried that updating using the CPI–U would have an adverse impact on low-wage regions and industries because inflation does not impact all regions uniformly. For example, Dollar Tree observed that the CPI–U "focuses exclusively on urban areas, and therefore fails to account for the rural economy and cost of living," and Lutheran Services in America Disability Network stated that this updating method "will disproportionately impact different regions, potentially worsening the income disparity and inadvertently harming workers." *See also, e.g.,* ACRA; ANCOR; SIGMA. Other commenters referenced the Department's past decision not to automatically update the salary level using an inflationary index. Although this fact was usually raised to assert that the Department lacked authority to automatically update the salary level, Fisher & Phillips referenced the Department's recognition in the NPRM that "inflation has been used as a method for setting the precise salary level *only in the breach,*" (emphasis in comment), as indicating that the CPI–U would not be an appropriate updating methodology. 80 FR 38533.

Finally, a few commenters suggested that the Department automatically update the salary level using methods other than those discussed in the NPRM. For example, AFL–CIO and AFSCME urged the Department to consider updating the salary level using BLS' Employment Cost Index for total compensation of management, professional, and related workers. *See also* UFCW. Many commenters, including several disability services providers, favored updating using "regional salary data." *See, e.g.,* Lutheran Services in America. WMATA stated that automatic updates affecting government entities should be tied to "the federal government's adjustments to General Schedule pay schedules," and the American Resort Development Association favored a fixed annual increase of, for example, two percent. Fisher & Phillips, which opposed both methods, wanted the Department to issue a new proposal to update the salary level using internal Department data on likely exempt workers.

The Department recognizes commenters' strong views on the proposed automatic updating alternatives and has considered the comments concerning this issue. The Department has determined that automatically updating the salary level using a fixed percentile of earnings will best ensure that the salary level test effectively differentiates between bona fide EAP workers who are not entitled to overtime and overtime-eligible white collar workers and continues to work effectively with the duties test. Accordingly, new § 541.607 will reset the salary level triennially using the same methodology used in this rulemaking to set the initial salary level—the 40th percentile of earnings of full-time salaried workers in the country's lowest-wage Census Region.

The Department agrees with the view of many commenters that the same reasons that justify setting the salary level at a fixed percentile of earnings of full-time salaried workers also support updating using this method. As explained at length in section IV.A., setting the initial salary level equal to the 40th percentile of earnings of full-time salaried workers in the South reflects the Department's best determination of the appropriate line of demarcation between exempt and nonexempt workers. This method provides necessary protection for workers by accounting for the elimination of the more stringent long duties test, while at the same time not excluding from exemption too many employees performing EAP duties in low-wage geographic areas, and yielding a lower salary that is appropriate across industries. Likewise, applying this same methodology for automatic updating is the most effective and transparent way to ensure that future salary levels continue to fulfill these objectives and work appropriately with the duties test.

Unlike the CPI–U method, updating the salary level based on the 40th percentile of earnings of full-time salaried workers in the country's lowest-wage Census Region also eliminates the risk that future salary levels will deviate from the underlying salary setting methodology established in this rulemaking. Ensuring that the salary level does not depart from the designated percentile ensures that the salary level does not become too low—leading to an increased risk of inappropriate classification of low-salaried employees as exempt—or too high—depriving employers of the exemption for employees performing bona fide EAP duties, and also ensures that the standard salary level continues to work effectively with the standard duties test. For the same reasons, the Department also declines to automatically update the salary level using any of the suggested alternatives (such as the Employment Cost Index, GS-Pay Scale, and others). These methods would result in different salary level setting and updating methodologies and thus increase the risk of future salary levels diverging from the appropriate line of demarcation between exempt and nonexempt workers, which would in turn necessitate additional rulemaking to reset the salary level or updating methodology.

The Department also concludes that it is preferable to update the salary level based on changes in earnings rather than changes in prices. As many commenters observed, a wage index provides the best evidence of changes in prevailing salary levels. While wages and prices may be correlated in the long-run, linking the salary level to earnings is the most direct way to ensure that the salary level reflects prevailing economic conditions and can thus fulfill its intended function. This approach is also consistent with the Department's longstanding practice of basing the salary requirement on actual salaries paid to workers. The salary level test works in tandem with the duties test to operate effectively, and we agree with the Chamber, FMI, and others that changes in job duties are more closely correlated with changes in wages than in prices. Similarly, using an earnings index for automatic updates is most consistent with the Department's long-held view that "the best single test of the employer's good faith in attributing importance to the employee's service is the amount [the employer] pays for them." Stein Report at 19. New § 541.607 provides that automatic updates will be based on CPS data for the 40th percentile of earnings of full-time salaried workers in the country's lowest-wage Census Region. This data will be readily available and transparent, and at the designated percentile is representative of those employees who may be bona fide executive, administrative, or professional workers.

Commenters that opposed the fixed percentile approach focused primarily on their concern that this methodology would lead to drastic salary level increases that would render the EAP exemptions virtually obsolete in certain industries and geographic areas. The linchpin of this "ratcheting" argument—and the crux of most opposition to the fixed percentile updating method—is the belief that employers will respond to an automatically updated salary level by converting newly nonexempt workers to hourly status, thus removing them from the data set of full-time salaried workers. The Department examined this issue closely and concludes that past experience and the comments themselves do not substantiate commenter concerns.

To evaluate the likelihood that salary level increases will lead employers to convert affected employees to hourly pay status, the Department first examined historical data concerning how employers responded to the 2004 Final Rule's salary increase. This prior rulemaking raised the standard salary level to 182 percent of the short test salary level—from $250 to $455.[79] As discussed in more detail in section VI.D.ix., if the salary level increase in 2004 led employers to convert significant numbers of workers to hourly status (as commenters assert will result from this rulemaking), then we would expect to see a notable *increase* in the share of workers earning just below the new threshold ($455) who are paid hourly relative to the share of workers earning just above the new threshold who are paid hourly. The Department looked at the share of full-time white collar workers paid on an hourly basis before and after the 2004 Final Rule (January–March 2004; January–March 2005) both below and above the standard salary level (at least $250 but less than $455 per week; at least $455 but less than $600 per week). The Department found that following the 2004 Final Rule, the share of full-time white collar workers being paid hourly actually *decreased* marginally in the group below the standard salary level and *increased* slightly in the group above the standard salary level. *See* section VI.D.ix. These results do not suggest that the 2004 salary level increase caused an increase in the share of workers paid hourly below the new threshold, and thus provide no evidence that salary level increases due to automatic updating will result in employers converting significant numbers of affected EAP workers to hourly pay status.[80]

In addition to the lack of historical data supporting commenters' concerns, commenters failed to persuasively support their key assumption that automatically updated salary levels will lead to widespread conversion of employees to hourly pay status. Most of these commenters, including Dollar Tree, Jackson Lewis, and several others simply stated—without citing any supporting data—that automatic updating would produce this effect, with several commenters mistakenly contending that such a conversion to hourly status was automatic. Even those commenters that provided more detailed economic analyses often rested their views on the same faulty assumption. For example, the submitted Oxford Economics letter assumed "that the lowest 40% of the salaried full-time wage distribution in 2016 were converted to hourly status." Some commenters predicted the impact of automatic updating on the salary level if a set percentage of employees were converted to hourly pay. For example, HR Policy Association predicted the effect if "the bottom 20 percent of salaried employees" were converted to hourly status, and the Chamber and PPWO (quoting an article from Edgeworth Economics) commented on the impact if 25 percent "of the full-time nonhourly workers earning less than [the 40th percentile salary level] were re-classified as hourly." But while these commenters stressed the purported impact of these employee conversion rates on the salary level, none explained why these rates are accurate estimates of employer responses.[81]

The Department believes that commenters that asserted that "ratcheting" will occur have greatly overestimated the number of employees that employers may convert to hourly status, and the impact that any such conversion would have on the salary level. Some commenters assumed that *all* (or a certain percentage of all) full-time salaried workers earning below the salary level would be converted to hourly status and dropped from the data set. This assumption is plainly erroneous because it fails to account for whether the employees perform white collar work and are subject to the EAP exemption. Of the 18.6 million full-time salaried white collar workers earning below the $913 salary level, only 4.2 million are currently exempt and earn between the current and new salary levels. The remaining 14.4 million workers are not currently classified as exempt under the EAP exemption, and so there is no reason to believe that their employers will convert them to hourly pay status as a result of this rulemaking. Accordingly, salary level predictions that are grounded in the belief that a certain percentage of *all* salaried workers will no longer be included in the BLS data set because they will be converted to hourly pay status regardless of whether or not they are affected by the rule are unsupported.

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[79] The 2004 Final Rule increased the salary level from the previous long test level of $155 per week (executive and administrative exemptions) or $170 per week (professional exemption) to $455 per week. For purposes of this analysis, the Department compared the increase from the short test salary level ($250 per week) since the long test was no longer operative due to increases in the minimum wage.

[80] To further test whether the widespread conversion to hourly pay status of newly nonexempt employees predicted by some commenters would occur, the Department also performed a similar analysis of increases in the state EAP salary level in California in 2007–2008 and 2014. In 2007–2008, the results showed a decrease in the share of full-time white collar workers paid on an hourly basis below the new salary level, thus providing no evidence of a "ratcheting" effect. In 2014, the share of full-time white collar workers paid on an hourly basis below the salary level increased marginally, but this impact was not significantly different from the change in the rest of the U.S. and thus provides no evidence that this effect was caused by changes to the salary level.

[81] Oxford Economics stated that its model was "not meant as a literal prediction of what the new rule would mean, since some non-exempt workers still report salaried status in the Current Population Survey, and since the process would be iterative." However, Oxford Economics did not attempt to quantify these other factors to produce a more accurate estimate.

Other commenters predicted that employers would convert all (or a significant percentage of) affected EAP employees to hourly status. The Department believes that these predications are also inaccurate because they fail to account for whether the affected employees work overtime. As discussed in the economic impact analysis of this Final Rule, the majority of workers affected by this rulemaking do not work more than 40 hours per week, and so employers will have no need to change their compensation and can continue to pay them a salary. Even as to those affected EAP workers who will become nonexempt and regularly or occasionally work overtime (which the Department estimates will be approximately 39 percent of the total number of affected EAP workers when the salary level is updated to $913), there is no reason to believe that employers will engage in wholesale conversion of these employees to hourly status. Employers commented at great length during outreach discussions prior to the publication of the NPRM and in the submitted comments that employees desire to be salaried because of status concerns. Also, the FLSA and regulations promulgated under it expressly permit paying nonexempt employees a salary so long as they receive overtime compensation when they exceed 40 hours during a workweek. *See* §§ 778.113-.114. The Department therefore anticipates that employers will continue to pay many affected EAP workers who work overtime on a salary basis, and these workers therefore will remain part of the distribution of full-time salaried workers. As discussed in detail later, our analysis of the impacts of the 2004 Final Rule further supports our assumption that employers will not convert large numbers of newly overtime-eligible salaried employees to hourly pay status. Accordingly, the pool of workers who are likely to be converted to hourly pay is much smaller than supposed by those commenters that assert that the fixed percentile approach will lead to drastic salary level increases.

To the extent that some affected EAP workers are converted to hourly status and not included in the BLS data set of all salaried workers, the Department believes this will have a negligible impact on the salary level because this group would not constitute more than a small fraction of the population of full-time salaried workers that comprises the data set used to calculate the salary level. The Department believes that employers will have little incentive to change the pay status of those affected employees who do not work overtime (60.4 percent of affected employees); similarly, employers will not change the salaried status of those employees who work overtime and whose salary is raised to maintain their exempt status (2.3 percent of affected employees). The Department therefore believes that an upper bound estimate of any potential "ratcheting" effect would assume the conversion to hourly pay status of all newly nonexempt employees working either occasional or regular overtime (approximately 37.3 percent of affected employees). Based on this assumption, the Department estimated that the salary level as set in this Final Rule (based on weekly earnings of full-time salaried workers in the South) could be approximately two and a-half percent higher due to this effect in 2026, after three updates. This estimate is significantly smaller than the estimates provided by commenters that argued use of a fixed percentile for updating would lead to widespread conversion of salaried employees to hourly pay status. *See* section VI.D.ix.

The sample used to set the standard salary level—full-time salaried workers in the South—represents 20 million workers, including, for example, blue-collar salaried workers to whom this rulemaking does not apply and overtime-eligible white collar employees. The Department estimates that 671,000 affected EAP employees in the South regularly or occasionally work overtime, which represents just 3.3 percent of the sample. For the reasons discussed above, many of these workers are likely to remain salaried. But as noted above, even if we assume that all affected employees who occasionally or regularly work overtime are converted to hourly pay status (and therefore are no longer part of the sample), the impact on the salary level will be minimal because they constitute such a small percentage of the sample. For the same reasons, the Department does not share commenter concerns that the salary level will drastically increase if employers raise affected employees' salaries to preserve their exempt status. The Department estimates that approximately 43,000 affected employees in the South will fall into this category, constituting just 0.2 percent of the 20 million workers in the sample.

For the above reasons, the Department concludes that automatically updating the salary level using a fixed percentile of earnings will not cause the salary level to diverge from prevailing economic conditions, and thus we do not share commenters' concerns about "ratcheting" or believe that they provide a basis for declining to adopt the fixed percentile updating method. Moreover, the Department's decision to reset the salary level triennially (instead of annually) would further minimize any ratcheting if such an effect were to occur.

Beyond concerns about a possible ratcheting effect, commenters raised relatively few additional objections to the fixed percentile method of automatic updating. The Department agrees with commenters that updating the salary level using an inappropriate earnings percentile would produce an improper salary level. However, for the reasons previously discussed at length, the Department has concluded that setting the salary level at the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region produces the appropriate line of demarcation between exempt and nonexempt workers. Similarly, the Department's decision to change the updating mechanism from a nationwide to a regional data set addresses commenter concerns about the impact of the fixed percentile approach on low-wage regions and industries.

The Department believes that the chosen updating method is also responsive to many of the reasons that commenters provided for supporting updating using the CPI–U. For example, some commenters lauded the CPI's familiarity and widespread acceptance. The CPS data set is publicly available, as is BLS' deciles table for Census Regions that the Department will use for automatic updates. Other commenters stressed that updating using the CPI–U would ensure that the salary level keeps pace with inflation. These commenters were generally concerned with the adverse effect of a fixed salary level, as opposed to the effect of updating using the CPI–U versus another approach. The Department believes that a regularly updated salary level reflecting changes in salaries paid will largely alleviate this inflation concern, particularly to the extent that changes in wages and prices are correlated over time. For all the above reasons, the Department has decided to automatically update the salary level using the 40th percentile of earnings of full-time salaried workers in the country's lowest-wage Census Region.

The Department's proposal also sought public comment on whether automatic updates to the salary level should take effect based on the effective date of the Final Rule, on January 1, or on some other specified date. The majority of commenters that addressed this issue favored January 1. For example, Tinker Federal Credit Union stated that this date corresponds with when their internal pay changes become effective, and AH&LA stated that updating the salary level mid-year could cause newly nonexempt employees to "lose eligibility for a bonus and fringe benefits that he or she was counting on when the year began." Other commenters, including Nichols Kaster, Quicken Loans, and several small businesses, also favored January 1. In contrast, other organizations favored a July 1 effective date for automatically updated salary levels. ANCOR and numerous other non-profit organizations favored this date because their funding is linked to state budget cycles, and the "majority of states have a budget cycle that ends in June."

As multiple commenters observed, employers operate on varying fiscal calendars, and so it is impossible for the Department to select an effective date for automatically updated salary levels that will suit everyone. After reviewing commenter submissions on this issue, the Department has determined that future automatic updates to the salary level will take effect on January 1. The Department believes this effective date aligns with the pay practices of many employers and, when combined with the 150-day advance notice period, will best promote a smooth transition to new salary levels. While we recognize that some commenters favored new rates taking effect on July 1 to account for state budgeting cycles, any disruption caused by the January 1 effective date is mitigated by the Department's decision to update the salary level every three years and increase the amount of notice before automatically updated rates take effect. These changes ensure that those who favored a different effective date have ample notice of both when the Department will issue new salary levels and when these rates will apply.[82]

The Department also proposed to publish a notice with the new salary level in the **Federal Register** at least 60 days before the updated rates would become effective. Commenters that explicitly addressed this issue generally favored a longer notice period. For example, the American Council of Engineering Companies supported automatic updating but stated that "120 days' notice would be more workable for employers." Many commenters that opposed automatic updating similarly sought more advance notice should the Department go forward with the proposal. *See, e.g.,* ABA (at least six months); CUPA–HR (at least one year); SHRM (at least one year). Finally, some commenters deemed 60 days of notice inadequate, but did not suggest an alternative. *See, e.g.,* Credit Union National Association; NFIB; Seyfarth Shaw; University of Wisconsin.

In response to commenter concerns, the Department is increasing from 60 to at least 150 days the amount of notice provided before the updated salary level takes effect. The Department believes that this change will provide employers sufficient time to adjust to the new salary level, especially since (as previously discussed) between updates employers will be able to access BLS data to help anticipate the approximate size of the salary level change, while also ensuring that salary level updates are based on the most recent available data. This increase to 150 days is also more than the amount of notice the Department has provided in each of our prior rulemakings increasing the salary threshold. Accordingly, § 541.607(g) states that the Department will publish notice of the new salary level no later than 150 days before the updated rate takes effect.

As discussed in more detail in the economic impact analysis, the Department will set the new salary level using BLS' deciles table of Census Regions, without modifying the data in any way.[83] In order to ensure that the updated salary level is based on the most recent data, the Department will use data from the second quarter (April—June) of the year prior to the update. For example, the salary level that will take effect on January 1, 2020 will be published in the **Federal Register** on or before August 4, 2019, and will be based on BLS data for the second quarter of 2019.

The Department also proposed to update the HCE total annual compensation requirement with the same method and frequency used to update the standard salary level test. Relatively few commenters specifically addressed this aspect of the Department's proposal, and those that did generally supported updating using the same method—the fixed percentile approach or the CPI–U—used for updating the standard salary level. *See, e.g.,* NEA; NELA; Partnership; and several individual commenters. Similarly, those that opposed automatically updating the standard salary level also opposed automatically updating the HCE total annual compensation requirement. *See, e.g.,* PPWO; Seyfarth Shaw. In light of these comments, and given our decision to update the standard salary level using the fixed percentile method, the Final Rule provides that the Department will automatically update the HCE total annual compensation level triennially to keep it at the annualized value of the 90th percentile of the weekly earnings of full-time salaried workers nationwide. This updating methodology will ensure that only those who are "at the very top of [the] economic ladder" satisfy the total annual compensation requirement and are thus subject to a minimal duties test analysis. 69 FR 22174. The Department also finalizes our proposal to update the portion of the total annual compensation level that employers must pay on a salary basis ($913 as of the effective date of this rule) so that it continues to mirror the amount of the standard salary requirement as it is updated. As previously discussed in sections IV.C., highly compensated employees must receive at least the standard salary amount each pay period on a salary or fee basis without regard to the payment of nondiscretionary bonuses and incentive payments.

Finally, the Department proposed to automatically update the special salary level test for employees in American Samoa by keeping it at 84 percent of the standard salary level, and to automatically update the base rate test for motion picture industry employees by changing the base rate proportionately to the change in the standard salary level. *See* 80 FR 38541. The Department did not receive any comments opposing these proposed updating mechanisms, and new §§ 541.607(b) and (c) finalize these proposals.

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[82] The U.S. Department of Treasury-Office of Human Capital Strategic Management asked that each automatically updated salary level become effective at "the start of the pay period following the date of the annual adjustment" in order to avoid having a new salary level take effect in the middle of a pay period. We appreciate this comment, but have decided not to institute this requested change. The Department has always made new salary levels effective on a specific date, rather than in relation to employer pay periods. We believe this practice remains appropriate, and that any administrative burden on employers will be minimal given that salary level changes will occur triennially and the Department will publish the new salary level in the **Federal Register** at least 150 days before it takes effect.

[83] This deciles table is currently available at: *http://www.bls.gov/cps/research_series_earnings_nonhourly_workers.htm.*

F. Duties Requirements for Exemption

Examination of the duties performed by the employee has always been an integral part of the determination of exempt status, and employers must establish that the employee's "primary duty" is the performance of exempt work in order for the exemption to apply. Each of the categories included in section 13(a)(1) has separate duties requirements. As previously discussed, from 1949 until 2004 the regulations contained two different duties tests for executive, administrative, and professional employees depending on the salary level paid—a long duties test for employees paid a lower salary, and a short duties test for employees paid at a higher salary level. The long duties test included a 20 percent limit on the time spent on nonexempt tasks (40 percent for employees in the retail or service industries). In the 2004 Final Rule, the Department replaced the differing short and long duties tests with a single standard test for executive, administrative, and professional employees that did not include a cap on the amount of nonexempt work that could be performed.

The Department has always recognized that the salary level test works in tandem with the duties requirements to identify bona fide EAP employees and protect the overtime rights of nonexempt white collar workers. The Department has often noted that as salary levels rise a less robust examination of the duties is needed. This inverse correlation between the salary level and the need for an extensive duties analysis was the basis of the historical short and long duties tests. While the salary provides an initial bright-line test for EAP exemption, application of a duties test is imperative to ensure that overtime-eligible employees are not swept into the exemption. While the contours of the duties tests have evolved over time, the Department has steadfastly maintained that meeting a duties test remains a core requirement for the exemption.

As explained in the NPRM, however, the Department is concerned that under the current regulations employees in lower-level management positions may be classified as exempt and thus ineligible for overtime pay even though they are spending a significant amount of their work time performing nonexempt work. In such cases, there is a question as to whether the employees truly have a primary duty of EAP work. The Department believes that our pairing in the 2004 rulemaking of a standard duties test based on the less stringent short test for higher paid employees, with a salary level based on the long test for lower paid employees, has exacerbated these concerns and led to the inappropriate classification as EAP exempt of employees who pass the standard duties test but would have failed the long duties test. As we noted in the NPRM, this issue can arise when a manager is performing exempt duties less than 50 percent of the time, but it is argued that those duties are sufficiently important to nonetheless be considered the employee's primary duty. It can also arise when a manager who is performing nonexempt duties much of the time is deemed to perform exempt duties concurrently with those nonexempt duties, and it is argued the employee is exempt on that basis.

While the Department believed that the proposed salary level increase, coupled with automatic updates to maintain the effectiveness of the salary level test, would address most of the concerns relating to the application of the EAP exemption, we invited comments on whether adjustments to the duties tests were also necessary. The Department did not propose any specific changes to the duties tests, but instead requested comment on a series of specific issues:

A. What, if any, changes should be made to the duties tests?

B. Should employees be required to spend a minimum amount of time performing work that is their primary duty in order to qualify for exemption? If so, what should that minimum amount be?

C. Should the Department look to the State of California's law (requiring that 50 percent of an employee's time be spent exclusively on work that is the employee's primary duty) as a model? Is some other threshold that is less than 50 percent of an employee's time worked a better indicator of the realities of the workplace today?

D. Does the single standard duties test for each exemption category appropriately distinguish between exempt and nonexempt employees? Should the Department reconsider our decision to eliminate the long/short duties tests structure?

E. Is the concurrent duties regulation for executive employees (allowing the performance of both exempt and nonexempt duties concurrently) working appropriately or does it need to be modified to avoid sweeping nonexempt employees into the exemption? Alternatively, should there be a limitation on the amount of nonexempt work? To what extent are exempt lower-level executive employees performing nonexempt work?

Finally, the Department solicited feedback regarding whether to add additional examples of specific occupations to the regulations to provide guidance in administering the EAP exemptions, particularly for employees in the computer and information technology industries. *See* 80 FR 38543.

After considering the comments received in response to the questions posed in the NPRM, the Department has decided against making any changes to the standard duties test or adding new examples to the regulations at this time. The Department recognizes that stakeholders have strong and divergent views about the standard duties test. We also recognize that changes to the duties test can be more difficult for employers and employees to both understand and implement. As explained in greater detail below, the Department believes that the standard salary level adopted in this Final Rule coupled with automatic updating in the future will adequately address the problems and concerns that motivated the questions posed in the NPRM about the standard duties test.

As an initial matter, many commenters asserted that the Department lacks the legal authority to enact any changes to the job duty requirements in this Final Rule without first proposing specific regulatory changes in a new NPRM. As we explained earlier with respect to our automatic updating mechanism, nothing in the APA or other referenced laws requires an agency's proposal to include regulatory text for all provisions that may appear in a final rule. *See* section IV.E.i.

There were some areas of agreement among the commenters in response to the questions posed in the NPRM. For example, a wide cross-section of commenters opposed the idea of reintroducing the long test/short test structure that existed before the 2004 rulemaking. A joint comment submitted by 57 labor law professors stated "it is now true that reimplementation of the two-tiered standards would serve to complicate, rather than simplify, the test for the exemption currently in use." Commenters representing employers stated that resurrecting the pre-2004 long test/short test structure would contravene the President's expressed intent to modernize and simplify the FLSA's overtime regulations, and expressed concern about the burden such an approach would impose. *See, e.g.,* Fisher & Phillips; FMI; Littler Mendelson; RILA; Seyfarth Shaw; Sheppard Mullin. Commenters representing employee interests, such as NELA, explained that "having two tests resulted in inefficient litigation as to which test applied to which employees for which periods of time," concluding that "it is best to proceed with a standard duties test supported by a realistic and fully indexed salary level test." *See also* Employee Rights Advocacy Group; Rudy, Exelrod, Zieff & Lowe.

Many commenters also seemed to appreciate the inverse relationship between the duties test and the salary level test. For example, although it disagreed with the Department's proposed standard salary level, HR Policy Association stated it "strongly agrees with the Department that the proposed salary level increase addresses the concerns relating to executive employees performing nonexempt duties." *See also* Employers Association of New Jersey. EEAC noted that "a robust salary threshold *and* strict duties tests" (emphasis in comment) would inappropriately screen out employees who should be classified as exempt. Commenters including AFL–CIO and the Alaska Department of Labor and Workforce Development, however, asserted that the proposed salary level was not sufficiently high to work with the current duties test and therefore the duties test needed to be strengthened.

Comments on the merits of changing the current duties requirements were sharply divergent, with many employee advocates supporting additional requirements to strengthen the standard duties test and most employer organizations strongly opposing any changes. Commenters representing employees generally asserted that changes to the standard duties test are needed to narrow the scope of an FLSA exemption they believe has been applied too broadly, as well as to reduce litigation and compliance costs attributable to the ambiguity and subjectivity of the primary duty test. Commenters representing employers generally opposed changes to the current duties test on the grounds that the kind of changes contemplated by the Department in the NPRM would be excessively burdensome and disruptive for employers and undermine the President's goal of modernizing the EAP regulations.

As a general matter, commenter views on the adequacy of the regulation's existing duty requirements reflected their broader disagreement over whether employees who pass the primary duty test but perform substantial amounts of nonexempt work should qualify as "bona fide" EAP workers. AFL–CIO, AFT, and SEIU, for example, stated that the standard duties test undermines the breadth of coverage critical to the success of the FLSA by allowing employers to exempt too many workers performing substantial amounts of nonexempt work, including workers earning more than the standard salary level proposed in the Department's NPRM. In contrast, the American Staffing Association and NSBA stated that the standard duties test appropriately emphasizes the importance of an employee's primary duty, not incidental nonexempt tasks he or she may also perform. Several commenters representing employers asserted that the duties test must account for the fact that exempt employees now perform more of their own clerical duties without the support of nonexempt administrative support staff. *See, e.g.,* Joint Comment of the International Public Management Association for Human Resources and the International Municipal Lawyers Association.

Employee and employer organizations similarly disagreed over whether the current standard duties test adequately works to prevent the misclassification of workers who do not meet the duties test and thus should receive overtime pay. Commenters representing employees, like NELP, stated that ambiguities in the existing duty requirements "enable employers to easily and successfully manipulate employee job titles to sweep more workers into the EAP exemptions." Some employers, however, disagreed that non-compliance by employers is prevalent, with SHRM asserting that there is no evidence that the standard duties test leads to "mass misclassification of employees." The New Jersey Employers Association commented that purported non-compliance in specific industries like restaurant or retail does not justify imposing burdensome new requirements on all employers throughout the entire economy.

Commenter views diverged even more sharply in response to the specific issues raised for consideration. Many employee advocates supported the introduction of a minimum requirement for time spent on an employee's primary duty to the standard duties test. A large number of these commenters endorsed the adoption of a California-style rule, which would require at least 50 percent of an employee's time to be spent exclusively on work that is the employee's primary duty. *See, e.g.,* AFSCME; Bend the Arc; ELC; Employment Justice Center; IWPR; Moreland law firm; National Women's Law Center; NDWA; NELP; Northwest Workers Justice Project; Partnership; SEIU; Shriver Center; Women Employed; Workplace Fairness. Other employee advocates expressed the point as a preference for a 50 percent limit on nonexempt work. *See, e.g.,* AFL–CIO; EPI; Nichols Kaster; Outten & Golden law firm. UFCW supported a 40-percent limit on the performance of nonexempt work, while Legare, Attwood & Wolfe supported reinstatement of the 20-percent limit on nonexempt work that existed under the former long duties test.

In support of such requirements, AFL–CIO, EPI, NELA, Nichols Kaster, and several other commenters asserted that employees who spend a majority of their time performing nonexempt duties should not qualify under the law as "bona fide" EAP workers. Legare, Attwood & Wolfe stated that while the percentage of time an employee spends performing duties is not a perfect indicator of her primary duty, it is a "very good proxy." ELC, the Moreland law firm, NELA, and several others asserted that adding a "bright-line" quantitative component to the standard duties test would simplify compliance or reduce FLSA litigation attributable to the subjectivity of the primary duty test, while AFL–CIO stated that implementing a more objective duties test would lead to fewer "anomalous outcomes" from court decisions analyzing similar sets of facts.

Several commenters representing employers addressed the issue of concurrent duties—that is, the provision in the executive duties test that permits employees to perform nonexempt duties while simultaneously performing exempt management duties. *See* § 541.106. A number of employer representatives noted that the Department examined this issue in 2004 when the concurrent duties regulation was promulgated as a separate provision and asserted that there was no need for the Department to alter the conclusions we reached at that time. *See, e.g.,* Chamber; FMI; IFA; Littler Mendelson. Other commenters discussed how the regulation applied to particular work environments. *See, e.g.,* ACRA ("Managers and assistant managers employed by ACRA's members often 'lead by example' by illustrating to subordinate employees how to provide top-notch customer service and take pride in all aspects of one's job."); RILA ("Leading by example by lending a hand at the cash register or on the sales floor is essential to employee training and morale, as well as good customer service."); Southeastern Alliance of Child Care Associations ("The 'concurrent duties' concept is of particular relevance to the child care industry. Consider, as an illustration, a director who, in cleaning and/or feeding a young student, simultaneously trains a new teacher on how students are to be cleaned and/or fed in compliance with state regulatory requirements."). UFCW, however, questioned whether employees were, in fact, leading by example and pitching-in or, instead, were being required by their employers to perform such large quantities of nonexempt work that their primary duty could not be said to be management. *See* UFCW ("many employers maintain policies which require exempt managers to spend substantial periods of time performing nonexempt hourly work" because they "do not budget sufficient hours for nonexempt employees to complete the work."). Some individual commenters echoed this concern. For example, a retail store manager described working 55–60 hours a week and because of low staffing noted that he has little "flexibility when an employee calls out sick. I have to pick up the slack." Similarly, a manager of a community home for the intellectually disabled stated that "[t]o reduce organizational overtime, managers are expected to work when employees call in sick, are on leave, and when a client is in the hospital and needs a 24 hour sitter."

While few commenters representing employees specifically addressed the concurrent duties provision, many endorsed California's duties test, which NWLC observed does not allow employers to credit "time during which non-exempt work is performed concurrently." *See Heyen* v. *Safeway Inc.,* 157 Cal. Rptr. 3d 280, 299–304 (Cal. Ct. App. 2013). AFL–CIO explained that it "is not enough to require that 'bona fide' EAP employees spend 50 percent of their time doing exempt work: they must spend 50 percent of their time *exclusively* on exempt work." (emphasis in comment); *see also* NELA; UFCW. Outten & Golden explicitly requested the Department to rescind the concurrent duties provision, asserting that it contributes to the confusion surrounding the application of the executive exemption and fails to account for instances "when the amount of non-exempt work overwhelms [an executive's] capacity to perform their supervisory functions."

Commenters representing employers strongly opposed the addition of any kind of limitation on the performance of nonexempt work to the standard duties test and any revisions to the concurrent duties regulation, stating that such changes would fail to account for the realities of the modern workplace. *See, e.g.,* Chamber; HR Policy Association; NCCR; NRF; NSBA; SIGMA. Further, many commenters, including AH&LA, NRA, Petroleum Marketers Association of America, PPWO, and SHRM, stated that imposing any quantitative restrictions or eliminating the concurrent duties regulation would prevent exempt employees from "pitching in" during staff shortages or busy periods, increasing labor costs or negatively affecting business efficiency and customer service. A few commenters representing employers also asserted such changes would undermine the sense of teamwork in the workplace. *See, e.g.,* American Resort Developmental Association; NCCR; Weirich Consulting.

AIA–PCI, NFIB, PPWO, and many others objected that introducing a cap on nonexempt work to the standard duties test would also impose significant recordkeeping burdens on employers, and several commenters, including the Chamber, Littler Mendelson, and RILA, noted that the Department previously acknowledged such concerns in the 2004 Final Rule. *See* 69 FR 22127. Some commenters, including AH&LA and NFIB, also asserted that the recordkeeping burden would at least partially fall onto exempt employees themselves. In addition, many commenters representing employers asserted that introducing a quantitative component to the duties test would increase FLSA litigation due to the administrative difficulties associated with tracking the hours of exempt employees. *See, e.g.,* AIA–PCI; CalChamber Coalition; Seyfarth Shaw; Weirich Consulting. FMI, IFA, Littler Mendelson, and the Chamber all noted that departing from the holistic approach to the standard duties test would "result in the upheaval of the past decade of case law and agency opinions."

After considering the comments, the Department has decided against adding a quantitative limitation on the performance of nonexempt work in the standard duties test, or making any other revisions to the duties test in this rulemaking. The Department continues to believe that, at some point, a disproportionate amount of time spent on nonexempt duties may call into question whether an employee is, in fact, a bona fide EAP employee. We also understand the concerns of some commenters that contend that the qualitative nature of the primary duty test may allow the classification of lower-level employees as exempt and thus ineligible for overtime pay even though they are spending a significant amount of work time performing nonexempt work. The Department expects that setting the standard salary level at the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region and updating that salary level on a regular basis going forward will address these concerns, which we believe are most prevalent among low-salaried white collar employees. While this salary level is lower than that proposed in the NPRM, the Department believes that it is sufficient to work effectively in combination with the current duties test. The Department will consider the impact of this rule going forward to ensure that the salary level and the duties test continue to work together to appropriately distinguish between exempt EAP employees and overtime-protected white collar workers.[84]

The Department also understands the concerns of employers and their advocates that prohibiting managers from "pitching-in" could negatively affect the workplace. The Department believes, however, that there is an important difference between a manager who occasionally demonstrates how to properly stock shelves to instruct a new employee, or who occasionally opens an additional cash register to assist in clearing a line of waiting customers, and a manager who must routinely perform significant amounts of nonexempt work because her employer does not provide appropriate staffing on all shifts. *See* AH&LA ("In short, when an exempt manager makes the decision that he or she needs to perform non-exempt duties to help the operation run smoothly, the manager's primary duty continues to be managing his or her staff and the operations of their department."); NRA ("Performing hands-on work at the manager's own discretion to ensure that operations are successfully run in no way compromises the fact that the manager's primary responsibility is performing exempt work."). In those situations such as those described by employee commenters above, where managers as a practical matter must perform significant amounts of nonexempt work, the Department does not believe that the manager is in any meaningful sense able to "make the decision regarding when to perform nonexempt duties" and a close examination of the specific facts must be made of whether the employee's primary duty is, in fact, the performance of exempt work. § 541.106(a).

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[84] Some commenters, including AT&T, the Brevard Achievement Center, Eden Financial, and the Nixon Peabody law firm, suggested eliminating the duties test entirely, making exempt status dependent on the amount of an employee's salary alone. As we have done in prior rulemakings, we again reject such an approach as precluded by the FLSA. As the Department said in 1949, the "Administrator would undoubtedly be exceeding his authority if he included within the definition of these terms craftsmen, such as mechanics, carpenters, or linotype operators, no matter how highly paid they might be." Weiss Report at 23. Most recently, in the 2004 Final Rule, we stated "the Secretary does not have authority under the FLSA to adopt a 'salary only' test for exemption." 69 FR 22173. Our conclusion that there is a necessity for the duties tests in order to define who is a bona fide exempt EAP employee has not changed.

In the NPRM, the Department also sought feedback regarding whether additional occupation examples should be added to the regulations, and, if so, which specific examples would be most helpful to include. Some commenters, including the American Staffing Association, the Maryland Chamber of Commerce, and the Poarch Band of Creek Indians, agreed that adding new examples to the regulations would be helpful in applying the EAP exemption. The American Trucking Association stated that additional regulatory examples would be particularly useful for clarifying the administrative employee exemption, which many commenters asserted is more ambiguous than the executive or professional exemptions. A number of commenters offered specific suggestions of occupations they would like to see addressed in the regulations. *See, e.g.,* American Staffing Association (staffing firm recruiters and account managers); American Trucking Association (truck company dispatchers); Information Technology Alliance for Public Sector (employees performing various computer-related duties); Joint Comment of Postdoctoral Associations and individuals (postdoctoral fellows); Printing Industries of America (customer service representatives). The Fraternity Executives Association, the International Association of Fire Chiefs, and the Michigan Society of Association Executives, requested regulatory examples relevant to associations, membership organizations and charitable foundations.

ABA and several commenters representing employees, including AFL–CIO, however, asserted that regulatory examples distract from the longstanding principle that job titles alone are insufficient to establish the exempt status of an employee. Nichols Kaster stated that regulatory examples of exempt occupations "encourage employers to manipulate job descriptions to classify non-exempt employees as exempt." Finally, AFL–CIO and NELA each stated that including additional examples of generally exempt or generally nonexempt occupations is neither helpful nor necessary.

Upon further consideration, the Department has decided against introducing any new examples to the existing regulations in this rulemaking. We note that the existing examples in the regulations do not provide categorical exemptions for certain occupations but instead set out typical job duties associated with specific occupations which if performed by an employee generally would, or generally would not, qualify the employee for exemption. In all instances, it is the application of the duties test to the specific facts of the employee's work that determines whether the employee satisfies the requirements for the EAP exemption. Although the Department received feedback on suggested regulatory examples from some commenters, the stakeholder input we received overall did not justify the introduction of any new examples into the EAP regulations at this time.

V. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, and its attendant regulations, 5 CFR part 1320, requires that the Department consider the impact of paperwork and other information collection burdens imposed on the public. Under the PRA, an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number. *See* 5 CFR 1320.8(b)(3)(vi).

OMB has assigned control number 1235–0018 to the Fair Labor Standards Act (FLSA) information collections. OMB has assigned control number 1235–0021 to Employment Information Form collections, which the Department uses to obtain information from complainants regarding FLSA violations. In accordance with the PRA, the Department solicited comments on the FLSA information collections and the Employment Information Form collections in the NPRM published July 6, 2015, *see* 80 FR 38516, as the NPRM was expected to impact these collections. 44 U.S.C. 3506(c)(2). The Department also submitted a contemporaneous request for OMB review of the proposed revisions to the FLSA information collections, in accordance with 44 U.S.C. 3507(d). On September 29, 2015, OMB issued a notice for each collection (1235–0018 and 1235–0021) that continued the previous approval of the FLSA information collections and the Employment Information Form collections under the existing terms of clearance. OMB asked the Department to resubmit the information collection request upon promulgation of the Final Rule and after considering public comments on the proposed rule dated July 6, 2015.

Circumstances Necessitating Collection: The FLSA, 29 U.S.C. 201 *et seq.*, sets the federal minimum wage, overtime pay, recordkeeping and youth employment standards of most general application. Section 11(c) of the FLSA requires all employers covered by the FLSA to make, keep, and preserve records of employees and of wages, hours, and other conditions and practices of employment. An FLSA covered employer must maintain the records for such period of time and make such reports as prescribed by regulations issued by the Secretary of Labor. The Department has promulgated regulations at part 516 to establish the basic FLSA recordkeeping requirements, which are approved under OMB control number 1235–0018.

FLSA section 11(a) provides that the Secretary of Labor may investigate and gather data regarding the wages, hours, or other conditions and practices of employment in any industry subject to the FLSA, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters deemed necessary or appropriate to determine whether any person has violated any provision of the FLSA. 29 U.S.C. 211(a). The information collection approved under OMB control number 1235–0021 provides a method for the Wage and Hour Division of the U.S. Department of Labor to obtain information from complainants regarding alleged violations of the labor standards the agency administers and enforces. This Final Rule revises the existing information collections previously approved under OMB control number 1235–0018 (Records to be Kept by Employers—Fair Labor Standards Act) and OMB control number 1235–0021 (Employment Information Form).

This Final Rule does not impose new information collection requirements; rather, burdens under existing requirements are expected to increase as more employees receive minimum wage and overtime protections due to the proposed increase in the salary level requirement. More specifically, the changes adopted in this Final Rule may cause an increase in burden on the regulated community because employers will have additional employees to whom certain long-established recordkeeping requirements apply (*e.g.,* maintaining daily records of hours worked by employees who are not exempt from the both minimum wage and overtime provisions). Additionally, the changes adopted in this Final Rule may cause an initial increase in burden if more employees file a complaint with WHD to collect back wages under the overtime pay requirements.

Public Comments: The Department sought public comments regarding the burdens imposed by information collections contained in the proposed rule. Several employer commenters and those representing them stated that employers would need to maintain records of hours worked for more employees as a result of our proposal to increase the salary level. *See, e.g.,* American Feed Industry Association; National Roofing Contractors Association; Nebraska Furniture Mart. Many of these comments came from individual employers as part of a campaign organized by the National Automatic Merchandising Association (NAMA), stating that the Department's proposal to raise the salary threshold would "create a challenge by placing a burden on the employers to closely track nonexempt employees' hours to ensure compliance with overtime pay and other requirements," and this "tracking of hours would also produce increased human resources paperwork." The Office of Advocacy of the U.S. Small Business Administration asserted that increasing the salary level as the Department proposed would add "significant" paperwork burdens on small entities, "particularly businesses in low wage regions and in industries that operate with low profit margins." In addition, some commenters expressed concern that the Department's cost estimates related to recordkeeping were too low, given that employers would need to set up revised recordkeeping and payroll systems for newly overtime-eligible employees. *See, e.g.,* NSBA; Reid Petroleum; SA Photonics; Seyfarth Shaw; Surescan Corporation. The National Association for Home Care and Hospice asserted that if the Department were to adopt the proposed salary level, home care and hospice companies would need to "completely modify their recordkeeping on worker time," and "such changes will double payroll management costs." In response to these comments, the Department notes that we believe that most employers currently have both exempt and nonexempt workers and therefore have systems already in place for employers to track hours. The Department also notes that commenters did not offer alternatives for estimates or make suggestions regarding methodology for the PRA burdens. The actual recordkeeping requirements are not changing in the Final Rule. However, the pool of workers for whom an employer will be required to make and maintain records has increased under the Final Rule, and as a result the burden hours have increased. Included in this PRA section are the regulatory familiarization costs for this Final Rule. We note however, that this is a duplication of the regulatory familiarization costs contained in the economic impact analysis, *see* section VI.

A number of commenters also expressed concern about potential changes to the duties tests. Some commenters specifically articulated concern about implementing a percentage duties test. *See, e.g.,* American Society of Association Executives (ASAE); Community Bankers Association; International Franchise Association; Lutheran Services of America; Society for Human Resources Management. For example, Walmart stated that it "would be concerned if such a proposal includes any quantitative or time based assessment of an exempt employee's duties or further, a prohibition on concurrent duties. Such changes would require employers to undertake significant recordkeeping burdens and add to the uncertainty over classifications." Other commenters expressed their view that the Department would violate the PRA by making any changes to the duties tests, because the Department did not provide specific proposed changes to the duties tests in the NPRM. *See, e.g.,* ASAE; Christian Camp and Conference Association, International; Community Bankers Association; Diving Equipment and Marketing Association; Equal Employment Advisory Committee; International Bancshares Corporation, International Dairy Foods Association; Island Hospitality Management; National Council of Chain Restaurants; National Retail Federation; New Jersey Association of Mental Health and Addiction Agencies; Recreational Diving Industry; WorldatWork; YMCA–USA. Since the Department has decided against enacting any changes to the standard duties test or adding new examples to the current regulatory text at this time, these commenters' concerns have been addressed.

An agency may not conduct an information collection unless it has a currently valid OMB approval, and the Department has submitted the identified information collection contained in the proposed rule to OMB for review under the PRA under the Control Numbers 1235–0018 and 1235–0021. *See* 44 U.S.C. 3507(d); 5 CFR 1320.11. The Department has resubmitted the revised FLSA information collections to OMB for approval, and intends to publish a notice announcing OMB's decision regarding this information collection request. A copy of the information collection request can be obtained at *http://www.Reginfo.gov* or by contacting the Wage and Hour Division as shown in the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

OMB Control Number: 1235–0018.

Affected Public: Businesses or other for-profit, farms, not-for-profit institutions, state, local and tribal governments, and individuals or households.

Total Respondents: 5,511,960 (2,506,666 affected by this Final Rule).

Total Annual Responses: 46,057,855 (2,552,656 from this Final Rule).

Estimated Burden Hours: 3,489,585 (2,506,666 from this Final Rule)

Estimated Time per Response: various.

Frequency: Various.

Total Burden Cost (capital/startup): 0.

Total Burden Costs (operation/maintenance): $126,392,768 ($90,791,443 from this Final Rule).

Title: Employment Information Form.

OMB Control Number: 1235–0021.

Affected Public: Businesses or other for-profit, farms, not-for-profit institutions, state, local and tribal governments, and individuals or households.

Total Respondents: 37,367 (2,017 added by this rulemaking).

Estimated Number of Responses: 37,367 (2,017 added by this rulemaking).

Estimated Burden Hours: 12,456 (672 hours added by this rulemaking).

Estimated Time per Response: 20 minutes (unaffected by this rulemaking).

Frequency: Once.

Other Burden Cost: 0.

VI. Analysis Conducted In Accordance with Executive Order 12866, Regulatory Planning and Review, and Executive Order 13563, Improving Regulation and Regulatory Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of a regulation and to adopt a regulation only upon a reasoned determination that the regulation's net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity) justify its costs. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

Under Executive Order 12866, the Office of Management and Budget (OMB) must determine whether a regulatory action is a "significant regulatory action,'' which includes an action that has an annual effect of $100 million or more on the economy. Significant regulatory actions are subject to review by OMB. As described below, this Final Rule is economically significant. Therefore, the Department has prepared a Regulatory Impact Analysis (RIA)[85] in connection with this Final Rule as required under section 6(a)(3) of Executive Order 12866, and OMB has reviewed the rule.

A. Introduction

i. Background

The Fair Labor Standards Act (FLSA or Act) requires covered employers to: (1) Pay employees who are covered and not exempt from the Act's requirements not less than the federal minimum wage for all hours worked and overtime premium pay at a rate of not less than one and one-half times the employee's regular rate of pay for all hours worked over 40 in a workweek, and (2) make, keep, and preserve records of the persons employed by the employer and of the wages, hours, and other conditions and practices of employment. It is widely recognized that the general requirement that employers pay a premium rate of pay for all hours worked over 40 in a workweek is a cornerstone of the Act, grounded in two policy objectives. The first is to spread employment (or, in other words, reduce involuntary unemployment) by incentivizing employers to hire more employees rather than requiring existing employees to work longer hours. The second policy objective is to reduce overwork and its detrimental effect on the health and well-being of workers.

The FLSA provides a number of exemptions from the Act's minimum wage and overtime pay provisions, including one for bona fide executive, administrative, and professional (EAP) employees. Such employees perform work that cannot easily be spread to other workers after 40 hours in a week and that is difficult to standardize to any timeframe; they also typically receive more monetary and non-monetary benefits than most blue collar and lower-level office workers. The exemption applies to employees employed in a bona fide executive, administrative, or professional capacity and for outside sales employees, as those terms are ''defined and delimited'' by the Department. 29 U.S.C. 213(a)(1). The Department's regulations implementing these ''white collar'' exemptions are codified at part 541.

For an employer to exclude an employee from minimum wage and overtime protection pursuant to the EAP exemption, the employee generally must meet three criteria: (1) The employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the ''salary basis test''); (2) the amount of salary paid must meet a minimum specified amount (the ''salary level test''); and (3) the employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (the ''duties test''). The Department has periodically updated the regulations governing these tests since the FLSA's enactment in 1938, most recently in 2004 when, among other revisions, the Department created the standard duties test and paired it with a salary level test of $455 per week. The Department also established an abbreviated duties test for highly compensated employees (HCE)—*i.e.,* white collar workers with a total annual compensation of at least $100,000. To satisfy the total annual compensation requirement, an employee must earn at least $455 per week on a salary or fee basis, and total annual compensation may also include commissions, nondiscretionary bonuses, and other nondiscretionary compensation.

As a result of inflation, the real value of the standard salary and HCE compensation thresholds have fallen significantly since they were set in 2004, making them inconsistent with Congress' intent to exempt only ''bona fide'' EAP workers, who typically earn salaries well above those of any workers they may supervise and presumably enjoy other privileges of employment such as above average fringe benefits, greater job security, and better opportunities for advancement. Stein Report at 21–22. For example, the annualized equivalent of the standard salary level ($23,660, or $455 per week for 52 weeks) is now below the 2015 poverty threshold for a family of four ($24,036).[86] Similarly, by October 1, 2016, approximately 20 percent of full-time salaried workers are projected to earn at least $100,000 annually, almost three times the share who earned that amount when the HCE test was created.

The premise behind the standard salary level test and the HCE total annual compensation requirement is that employers are more likely to pay higher salaries to workers in bona fide EAP jobs. A high salary is considered a measure of an employer's good faith in classifying an employee as exempt, because an employer is less likely to have misclassified a worker as exempt if he or she is paid a high wage. Stein Report at 5; Weiss Report at 8.

The salary level requirement was created to identify the dividing line distinguishing workers who may be performing exempt duties from the nonexempt workers whom Congress intended to be protected by the FLSA's minimum wage and overtime provisions. Throughout the regulatory history of the FLSA, the Department has considered the salary level test the ''best single test'' of exempt status. Stein Report at 19. This bright-line test is easily observed, objective, and clear. *Id.*

ii. Need for Rulemaking

The salary level test has been updated seven times since it was implemented in 1938. Table 1 presents the weekly salary levels associated with the EAP exemptions since 1938, organized by exemption and long/short/standard duties test.[87]

TABLE 1—HISTORICAL SALARY LEVELS FOR THE EAP EXEMPTIONS

Date enacted	Long test			Short test (all)
	Executive	Administrative	Professional	
1938	$30	$30	....	....
1940	30	50	$50	....
1949	55	75	75	$100
1958	80	95	95	125

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[85] The terms ''regulatory impact analysis'' and ''economic impact analysis'' are used interchangeably throughout this Final Rule.

[86] This is the 2015 poverty threshold for a family of four with two related people under 18 in the household. Available at: *http://www.census.gov/hhes/www/poverty/data/threshld/index.html.*

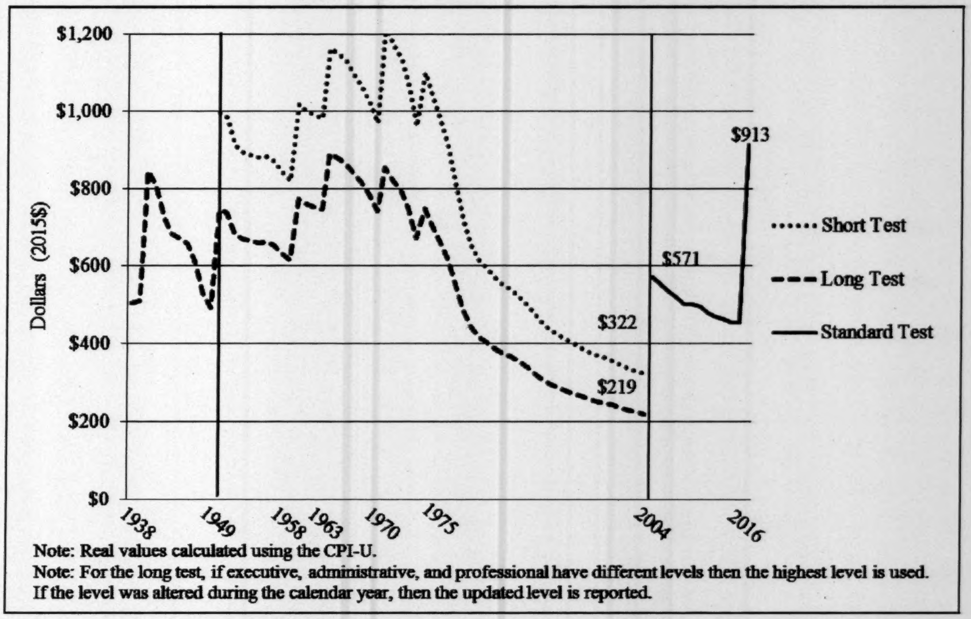
[87] From 1949 until 2004 the regulations contained two different tests for exemption—a long duties test for employees paid a lower salary, and a short duties test for employees paid at a higher salary level.

TABLE 1—HISTORICAL SALARY LEVELS FOR THE EAP EXEMPTIONS—Continued

Date enacted	Long test			Short test (all)
	Executive	Administrative	Professional	
1963	100	100	115	150
1970	125	125	140	200
1975	155	155	170	250
Standard Test				
2004	$455			

In 2004, the Department set the standard salary level at $455 per week. Following more than ten years of inflation, the purchasing power, or real value, of the standard salary level test has eroded substantially, and as a result increasingly more workers earn above the salary threshold. Between 2004 and 2015, the real value of the standard salary level declined 20.3 percent, calculated using the Consumer Price Index for all urban consumers (CPI–U).[88] The decline is even larger when comparing the salary level in 2015 with 1975 levels. Figure 1 demonstrates how the real values of the salary levels have changed since 1938, measured in 2015 dollars. The Final Rule's standard salary level is below the real value of the short test salary level in all previous years when it was updated.

Figure 1: Real Values of the Salary Level Tests using the Long, Short, and Standard Duties Tests, 1938-2016



Note: Real values calculated using the CPI-U.

Note: For the long test, if executive, administrative, and professional have different levels then the highest level is used. If the level was altered during the calendar year, then the updated level is reported.

As a result of the erosion of the real value of the standard salary level, more and more workers lack the clear protection the salary level test is meant to provide. Each year that the salary level is not updated, its utility as a distinguishing mechanism between exempt and nonexempt workers declines. The Department has revised the levels just once in the 41 years since 1975. In contrast, in the 37 years between 1938 and 1975, salary test levels were increased approximately every five to nine years. In our 2004 rulemaking, the Department stated the intention to "update the salary levels on a more regular basis, as it did prior to 1975," and added that the "salary levels should be adjusted when wage survey data and other policy concerns support such a change." 69 FR 22171. Now, in order to restore the value of the standard salary level as a line of demarcation between those workers for whom Congress intended to provide minimum wage and overtime protections and those workers who may be performing bona fide EAP duties, and to maintain its continued validity, in this Final Rule the Department is setting the standard salary level equal to the 40th percentile of weekly earnings of all full-time salaried workers in the lowest-wage

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[88] CPI–U data available at: *http://data.bls.gov/cgi-bin/cpicalc.pl.*

Census Region. The Department determined the "lowest-wage Census Region" by examining Current Population Survey (CPS) data for each Census Region to find the region having the lowest salary amount at the 40th percentile of weekly earnings of full-time salaried workers, which currently is the South.[89] Based on the fourth quarter of 2015 CPS data, the 40th percentile for the South Census Region is $913 per week. To bring the HCE annual compensation requirement in line with the level established in 2004, the Department, in this Final Rule, is setting the HCE total annual compensation level at the 90th percentile of annualized weekly earnings of full-time salaried workers nationally. Based on the fourth quarter of 2015 CPS data, the HCE compensation level is $134,004 annually.

In addition, this Final Rule has introduced a mechanism to automatically update the standard salary and HCE total annual compensation levels every three years, with the first update taking effect on January 1, 2020. This triennial automatic updating will preserve the effectiveness of the salary level as a dividing line between nonexempt workers and workers who may be exempt, eliminate the volatility associated with previous changes in the thresholds, and increase certainty for employers with respect to future changes. It will also simplify the updating process, as the Department will simply publish a notice in the **Federal Register** with the updated salary and compensation thresholds at least 150 days in advance of the update, and post the updated salary and compensation levels on the Wage and Hour Division (WHD) Web site. Should the Department determine in the future that changes in the updating methodology may be warranted, the Department can engage in notice and comment rulemaking.

iii. Summary of Affected Workers, Costs, Benefits, and Transfers

The Department estimated the number of affected workers and quantified costs and transfer payments associated with this Final Rule. To produce these estimates, the Department used data from the CPS, a monthly survey of 60,000 households conducted by the U.S. Census Bureau. Many of the data variables used in this analysis are from the CPS's Merged Outgoing Rotation Group (MORG) data. The impacts calculated by the Department in this analysis are based on FY2013–FY2015 data projected to reflect FY2017. The Department used the same data available to the public to analyze the impact of this Final Rule.[90] Data for FY2015 were the most recently available at the time of writing.[91] However, the Department pooled three years of data in order to increase the sample size. Additionally, because the rulemaking will take effect December 1, 2016, the Department has projected the data to represent FY2017 as Year 1 (the fiscal year most similar to the first year of implementation).

Some commenters, such as the United States Chamber of Commerce (Chamber), National Retail Federation (NRF), and the Florida Department of Economic Opportunity (FL DEO), expressed concern that the estimated impacts in the Preliminary Regulatory Impact Analysis (PRIA) are not replicable. To the extent that these commenters suggested that the entire PRIA was based on non-public data, the Department emphasizes that we used the non-publicly available data only for determining percentiles of the earnings distribution. As we noted in the NPRM, the public will not be able to precisely recreate the salary amounts in the published deciles because to ensure the confidentiality of survey respondents, the data in BLS public-use files use adjusted weights and therefore minor discrepancies between internal BLS files and public-use files exist. *See* 80 FR 38528 n.24. Some commenters also asserted that the methodology used in the PRIA to estimate the impact of this rulemaking could not be replicated because the Department did not sufficiently explain our analysis. The Department believes that the analytic methodology was thoroughly described throughout the NPRM, PRIA and Appendix A, 80 FR 38545–601. Nevertheless, we have provided additional details in this RIA to address concerns about replicability.

The Department estimates that in FY2017, there will be 44.8 million white collar salaried employees who do not qualify for any other FLSA exemption and therefore may be affected by a change to the Department's part 541 regulations (Table 7). Of these workers, the Department estimates that 29.9 million would be exempt from the minimum wage and overtime pay provisions under the part 541 EAP exemptions (in the baseline scenario without the rule taking effect). The other 14.9 million workers do not satisfy the duties tests for EAP exemption and/or earn less than $455 per week (Table 7).[92] However, of the 29.9 million EAP-exempt workers, 7.4 million are in "named occupations" and thus need only pass the duties tests to be subject to the standard EAP exemptions.[93] Therefore, these workers are not considered in the analysis, leaving 22.5 million EAP-exempt workers potentially affected by this Final Rule.

In Year 1, an estimated 4.2 million workers will be affected by the increase in the standard salary level test (Table 2). This figure consists of currently EAP-exempt workers subject to the salary level test who earn at least $455 per week but less than the 40th percentile of full-time salaried workers in the South ($913). Additionally, an estimated 65,000 workers will be affected by the increase in the HCE compensation test.[94] Finally, 732,000 white collar, salaried workers making between $455 and $913 who do not meet the duties test are already overtime eligible but do not receive overtime pay because they are misclassified. While these workers are not "affected" by the Final Rule because their entitlement to overtime will not change, as a result of the change in the salary level their exemption status will be clear based on the salary test alone and they will no longer be misclassified due to misapplication of the duties test. In Year 10, with automatic updating,[95] 5.0 million workers are projected to be affected by the change in the standard salary level test and 217,000 workers will be affected by the change in the HCE total annual compensation test.

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[89] For simplicity, in this rulemaking we refer to the lowest-wage Census Region and the South interchangeably.

[90] To ensure the confidentiality of survey respondents, data in the public-use files use adjusted weights and top-coded earnings.

[91] FY2015 includes October 1, 2014 through September 30, 2015.

[92] Here and elsewhere in this analysis, numbers are reported at varying levels of aggregation, and are generally rounded to a single decimal point. However, calculations are performed using exact numbers. Therefore, some numbers may not match the reported total or the calculation shown due to rounding of components.

[93] Workers not subject to the EAP salary level test include teachers, academic administrative personnel, physicians, lawyers, judges, and outside sales workers.

[94] In later years, earnings growth will cause some workers to no longer be affected in those years because their earnings will exceed the salary threshold. Additionally, some workers will become newly affected because their earnings will exceed $455 per week, and in the absence of this Final Rule would have lost their overtime protections. In order to estimate the total number of affected workers over time, the Department accounts for both of these effects. Thus, in Year 2, an estimated 4.0 million workers will be affected, and by Year 10, an estimated 5.3 million workers will be affected.

[95] Future automatic updates to the standard salary and HCE compensation level requirements will occur in Years 4, 7, and 10.

Three direct costs to employers are quantified in this analysis: (1) Regulatory familiarization costs; (2) adjustment costs; and (3) managerial costs. Regulatory familiarization costs are the costs incurred to read and become familiar with the requirements of the rule. Adjustment costs are the costs accrued to determine workers' new exemption statuses, notify employees of policy changes, and update payroll systems. Managerial costs associated with this Final Rule occur because hours of workers who are newly entitled to overtime may be more closely scheduled and monitored to minimize or avoid overtime hours worked.

The costs presented here are the combined costs for both the change in the standard salary level test and the HCE annual compensation level (these will be disaggregated in section VI.D.iii.). Total average annualized direct employer costs over the first 10 years are estimated to be $295.1 million, assuming a 7 percent discount rate; hereafter, unless otherwise specified, average annualized values will be presented using the 7 percent real discount rate (Table 2). Deadweight loss (DWL) is also a cost but not a direct employer cost. DWL is a function of the difference between the wage employers are willing to pay for the hours lost, and the wage workers are willing to take for those hours. In other words, DWL represents the decrease in total economic surplus in the market arising from the change in the regulation. The Department estimates average annualized DWL to be $9.2 million.[96]

In addition to the costs described above, this Final Rule will also transfer income from employers to employees in the form of wages. The Department estimates average annualized transfers will be $1,189.1 million. The majority of these transfers are attributable to the FLSA's overtime provision; a far smaller share is attributable to the FLSA's minimum wage requirement. Transfers also include additional pay to increase the salaries of some affected EAP workers who remain exempt.

Employers may incur additional costs, such as hiring new workers. These other potential costs are discussed in section VI.D.iii. Benefits of this Final Rule are discussed in section VI.D.vii.

TABLE 2—SUMMARY OF REGULATORY COSTS AND TRANSFERS, STANDARD AND HCE SALARY LEVELS

[Millions 2017$]

Impact	Year 1	Future years[a]		Average annualized value	
		Year 2	Year 10	3% real rate	7% real rate
Affected Workers (1,000s)					
Standard	4,163	3,893	5,045		
HCE	65	73	217		
Total	4,228	3,965	5,261		
Costs and Transfers (Millions 2017$)[b]					
Direct employer costs	$677.9	$208.0	$284.2	$288.0	$295.1
Transfers[c]	1,285.2	936.5	1,607.2	1,201.6	1,189.1
DWL	6.4	8.7	11.1	9.3	9.2

[a] These costs/transfers represent a range over the nine-year span.

[b] Costs and transfers for affected workers passing the standard and HCE tests are combined.

[c] This is the net transfer that we primarily describe as being from employers to workers. There may also be transfers of hours and income from some workers to others. Moreover, some of these transfers may be intrapersonal, for instance, higher earnings may be offset by increased hours worked for employees who remain overtime-exempt or may be supplemented by reduced hours for some newly overtime-protected employees.

iv. Terminology and Abbreviations

The following terminology and abbreviations will be used throughout this RIA.

Affected EAP workers: The population of potentially affected EAP workers who either pass the standard duties test and earn at least $455 but less than the new salary level of the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (currently the South) ($913 in Year 1), or pass only the HCE duties test and earn at least $100,000 but less than the annualized earnings of the 90th percentile of full-time salaried workers nationally ($134,004 in Year 1). This is estimated to be 4.2 million workers.[97]

Baseline EAP exempt workers: The projected number of workers who would be EAP exempt in FY2017 if the rulemaking did not take effect.

BLS: Bureau of Labor Statistics.

CPI–U: Consumer Price Index for all urban consumers.

CPS: Current Population Survey.

Duties test: To be exempt from the FLSA's minimum wage and overtime requirements under section 13(a)(1), the employee's primary job duty must involve bona fide executive, administrative, or professional duties as defined by the regulations. The Department distinguishes among four such tests:

Standard duties test: The duties test used in conjunction with the standard salary level test, as set in 2004 and applied to date, to determine eligibility for the EAP exemptions. It replaced the short and long tests in effect from 1949 to 2004, but its criteria closely follow those of the former short test.

HCE duties test: The duties test used in conjunction with the HCE total annual compensation requirement, as set in 2004 and applied to date, to determine eligibility for the HCE exemption. It is much less stringent than the standard and short duties tests to reflect that very highly paid employees are much more likely to be properly classified as exempt.

Long duties test: One of two duties tests used from 1949 until 2004; this more restrictive duties test had a greater number of requirements, including a limit on the amount of nonexempt work that could be performed, and was used in conjunction with a lower salary level to determine eligibility for the EAP exemptions (*see* Table 1).

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[96] The estimate of DWL assumes the market meets the theoretical conditions for an efficient market in the absence of this intervention (*e.g.,* all conditions of a perfectly competitive market hold: full information, no barriers to entry, etc.). Since labor markets are generally not perfectly competitive, this is likely an overestimate of the DWL.

[97] Setting the standard salary level at the 40th percentile of weekly earnings of full-time salaried workers in the South is estimated to affect 4,163,000 workers. *See* Table 2. The estimate is based on the effect of the change in overtime protection under the FLSA from this Final Rule. It includes workers who may currently be overtime-eligible under more protective state EAP laws and regulations, such as some workers in Alaska, California, and New York. Additionally, 65,000 workers are potentially affected by the change in the HCE exemption's total compensation level. *Id.* Accordingly, throughout this RIA we refer to the total affected workers as 4.2 million (4,163,000 + 65,000, rounded to the nearest 100,000 workers).

Short duties test: One of two duties tests used from 1949 to 2004; this less restrictive duties test had fewer requirements, did not limit the amount of nonexempt work that could be performed, and was used in conjunction with a higher salary level to determine eligibility for the EAP exemptions (*see* Table 1).

DWL: Deadweight loss; the loss of economic efficiency that can occur when the perfectly competitive equilibrium in a market for a good or service is not achieved.

EAP: Executive, administrative, and professional.

FY: Fiscal year. The federal fiscal year is from October 1 through September 30.

HCE: Highly compensated employee; a category of EAP exempt employee, established in 2004 and characterized by high earnings and a minimal duties test.

Hourly wage: For the purpose of this RIA, the amount an employee is paid for an hour of work.

Base hourly wage: The hourly wage excluding any overtime payments. Also used to express the wage rate without accounting for benefits.

Implicit hourly wage: Hourly wage calculated by dividing reported weekly earnings by reported hours worked.

Straight time wage: Another term for the hourly wage excluding any overtime payments.

MORG: Merged Outgoing Rotation Group supplement to the CPS.

Named occupations: Workers in named occupations are not subject to the salary level or salary basis tests. These occupations include teachers, academic administrative personnel,[98] physicians,[99] lawyers, judges,[100] and outside sales workers.

Overtime workers: The Department distinguishes between two types of overtime workers.

Occasional overtime workers: The Department uses two steps to identify occasional overtime workers. First, all workers who report they usually work 40 hours or less per week (identified with variable PEHRUSL1 in CPS MORG) but in the survey (or reference) week worked more than 40 hours (variable PEHRACT1 in CPS MORG) are classified as occasional overtime workers. Second, some additional workers who do not report usually working overtime and did not report working overtime in the reference week are randomly selected to be classified as occasional overtime workers so that the proportion of workers who work overtime in our sample matches the proportion of workers, measured using SIPP data, who work overtime at some point in the year.

Regular overtime workers: Workers who report they usually work more than 40 hours per week (identified with variable PEHRUSL1 in CPS MORG).

Pooled data for FY2013–FY2015: CPS MORG data from FY2013–FY2015 adjusted to represent FY2015 with earnings inflated to FY2017 dollars and sample observations weighted to reflect projected employment in FY2017. Pooled data were used to increase sample size.

Potentially affected EAP workers: EAP exempt workers who are not in named occupations and are included in the analysis (*i.e.*, white collar, salaried, not eligible for another (non-EAP) overtime pay exemption). This is estimated to be 22.5 million workers.

Price elasticity of demand (with respect to wage): The percentage change in labor hours demanded in response to a one percent change in wages.

Real dollars (2017$): Dollars adjusted using the CPI–U to reflect the purchasing power they would have in FY2017.

Salary basis test: The EAP exemptions' requirement that workers be paid on a salary basis, that is, a pre-determined amount that cannot be reduced because of variations in the quality or quantity of the employee's work.

Salary level test: The salary a worker must earn in order to be subject to the EAP exemptions. The Department distinguishes among four such tests:

Standard salary level: The weekly salary level associated with the standard duties test that determines eligibility for the EAP exemptions. The standard salary level was set at $455 per week in the 2004 Final Rule.

HCE compensation level: Workers who meet the standard salary level requirement but not the standard duties test nevertheless are exempt if they pass a minimal duties test and earn at least the HCE total annual compensation required amount. The HCE required compensation level was set at $100,000 per year in the 2004 Final Rule, of which at least $455 per week must be paid on a salary or fee basis.

Short test salary level: The weekly salary level associated with the short duties test (eliminated in 2004).

Long test salary level: The weekly salary level associated with the long duties test (eliminated in 2004).

SIPP: Survey of Income and Program Participation.

Workers covered by the FLSA and subject to the Department's part 541 regulations: Includes all workers except those excluded from the analysis because they are not covered by the FLSA or subject to the Department's requirements. Excluded workers include: Members of the military, unpaid volunteers, the self-employed, many religious workers, and federal employees (with a few exceptions).[101]

The Department also notes that the terms *employee* and *worker* are used interchangeably throughout this analysis.

B. Methodology To Determine the Number of Potentially Affected EAP Workers

i. Overview

This section explains the methodology used to estimate the number of workers who are subject to the EAP exemptions. In this Final Rule, as in the 2004 Final Rule, the Department estimated the number of EAP exempt workers because there is no data source that identifies workers as EAP exempt. Employers are not required to report EAP exempt workers to any central agency or as part of any employee or establishment survey.[102] The methodology described here is largely based on the approach the Department used in the 2004 Final Rule. 69 FR 22196–209. All tables include projected estimates for FY2017, which begins on October 1, 2016. Some tables also include estimates for FY2005 (the first full fiscal year after the most recent increase to the salary level was implemented) to demonstrate how the prevalence of the EAP exemption has changed in the 12 years since our last rulemaking. We note that the PRIA used calendar year 2005 whereas this Final Rule uses FY2005. Therefore, the numbers have changed slightly. Figure 2 illustrates how the U.S. civilian workforce was analyzed through successive stages to estimate the number of potentially affected EAP workers.

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[98] Academic administrative personnel (including admissions counselors and academic counselors) need to be paid either (1) the salary level or (2) a salary that is at least equal to the entrance salary for teachers in the educational establishment at which they are employed (*see* § 541.204). Entrance salaries at the educational establishment of employment cannot be distinguished in the data and so this alternative is not considered (thus these employees were excluded from the analysis, the same as was done in the 2004 Final Rule).

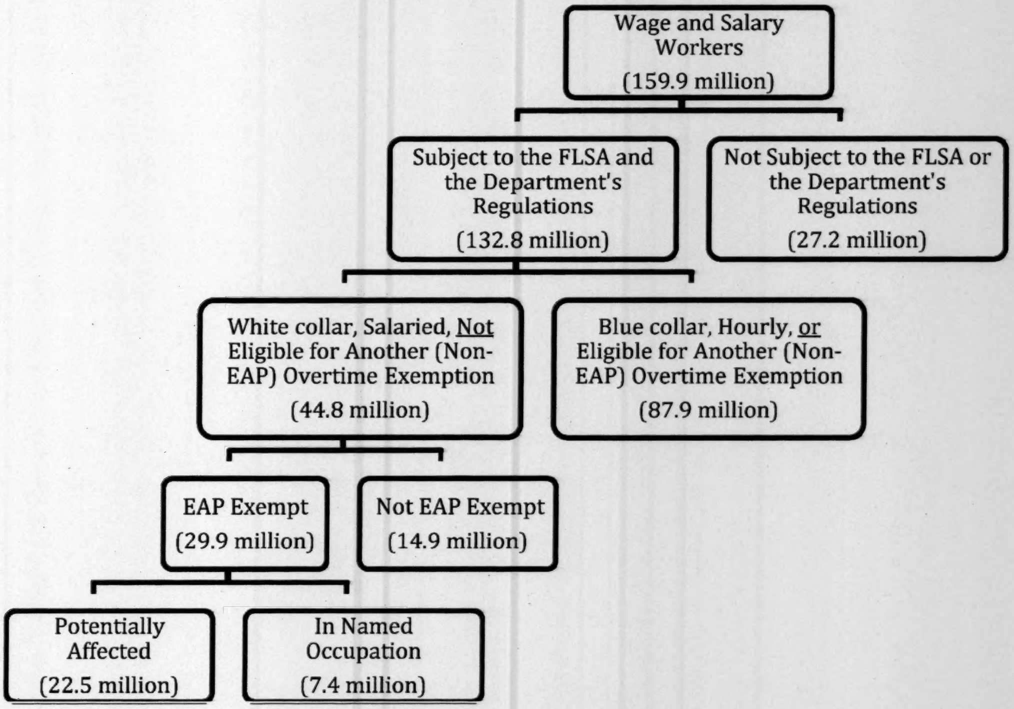
[99] The term physician includes medical doctors including general practitioners and specialists, osteopathic physicians (doctors of osteopathy), podiatrists, dentists (doctors of dental medicine), and optometrists (doctors of optometry or with a Bachelor of Science in optometry). § 541.304(b).

[100] Judges may not be considered "employees" under the FLSA definition. However, since this distinction cannot be made in the data, all judges are excluded (the same as was done in the 2004 Final Rule). Including these workers in the model as FLSA employees would not impact the estimate of affected workers.

[101] Employees of firms with annual revenue less than $500,000 who are not engaged in interstate commerce are also not covered by the FLSA. However, these workers are not excluded from this analysis because the Department has no reliable way of estimating the size of this worker population, although the Department believes it composes a small percent of workers. These workers were also not excluded from the 2004 Final Rule.

[102] RAND recently released results from a survey conducted to estimate EAP exempt workers. However, this survey does not have the variables or sample size necessary for the Department to base the RIA on this analysis. These survey results were submitted by the authors as a comment on the proposed rule. Rohwedder, S. and Wenger, J.B. (2015). The Fair Labor Standards Act: Worker Misclassification and the Hours and Earnings Effects of Expanded Coverage. RAND Labor and Population.

Figure 2: Flow Chart of FLSA Exemptions and Estimated Number of Potentially Affected Workers, Projected for FY2017


Wage and Salary Workers (159.9 million)
Subject to the FLSA and the Department's Regulations (132.8 million)
Not Subject to the FLSA or the Department's Regulations (27.2 million)
White collar, Salaried, Not Eligible for Another (Non-EAP) Overtime Exemption (44.8 million)
Blue collar, Hourly, or Eligible for Another (Non-EAP) Overtime Exemption (87.9 million)
EAP Exempt (29.9 million)
Not EAP Exempt (14.9 million)
Potentially Affected (22.5 million)
In Named Occupation (7.4 million)

ii. Data

The estimates of EAP exempt workers are based on data drawn from the CPS MORG, which is sponsored jointly by the U.S. Census Bureau and the BLS. The CPS is a large, nationally representative sample of the labor force. Households are surveyed for four months, excluded from the survey for eight months, surveyed for an additional four months, then permanently dropped from the sample. During the last month of each rotation in the sample (month 4 and month 16), employed respondents complete a supplementary questionnaire in addition to the regular survey.[103] This supplement contains the detailed information on earnings necessary to estimate a worker's exemption status. Responses are based on the reference week, which is always the week that includes the 12th day of the month.

Although the CPS is a large scale survey, administered to 60,000 households representing the entire nation, it is still possible to have relatively few observations when looking at subsets of employees, such as exempt workers in a specific occupation employed in a specific industry, or workers in a specific geographic location. To increase the sample size, the Department pooled together three years of CPS MORG data (FY2013 through FY2015). Earnings for each FY2013 and FY2014 observation were inflated to FY2015 dollars using the CPI–U, and the weight of each observation was adjusted so that the total number of potentially affected EAP workers in the pooled sample remained the same as the number for the FY2015 CPS MORG. Thus, the pooled CPS MORG sample uses roughly three times as many observations to represent the same total number of workers in FY2015. The additional observations allow the Department to better estimate certain attributes of the potentially affected labor force.

Next, this pooled sample was adjusted to reflect the FY2017 economy by further inflating wages and sampling weights to project to FY2017. The Department applied two years of wage growth based on the average annual growth rate in median wages. The wage growth rate is calculated as the geometric growth rate in median wages using the historical CPS MORG data for occupation-industry categories from FY2006 to FY2014.[104] [105] The geometric growth rate is the constant annual growth rate that when compounded (applied to the first year's wage, then to the resulting second year's wage, etc.) yields the last historical year's wage. This method only depends on the value of the wage in the first available year and the last available year.[106]

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[103] This is the outgoing rotation group (ORG); however, this analysis uses the data merged over twelve months and thus will be referred to as MORG.

[104] In order to maximize the number of observations used in calculating the median wage for each occupation-industry category, three years of data were pooled for each of the endpoint years. Specifically, data from FY2005, FY2006, and FY2007 (converted to FY2006 dollars) were used to calculate the FY2006 median wage and data from FY2013, FY2014, and FY2015 (converted to FY2014 dollars) were used to calculate the FY2014 median wage.

[105] In the NPRM only wage growth rates for exempt workers were used; therefore, growth was based on historical wage growth for exempt workers. Since the Final Rule projects all workers' earnings for Year 1, wage growth was estimated for all workers based on the historical growth rate for all workers. Additionally, for the Final Rule, the Department projected earnings prior to determining which workers are exempt, necessitating a change in the methodology.

[106] The geometric mean may be a flawed measure if either or both of those years were atypical; however, in this instance these values seem typical. An alternative method would be to use the time series of median wage data to estimate the linear trend in the values and continue this to project future median wages. This method may be preferred if either or both of the endpoint years are outliers, since the trend will be less influenced by them.

The geometric wage growth rate was also calculated from the BLS' Occupational Employment Statistics (OES) survey and used as a validity check.[107] Additionally, in occupation-industry categories where the CPS MORG data had an insufficient number of observations to reliably calculate median wages, the Department used the growth rate in median wages calculated from the OES data.[108] Any remaining occupation-industry combinations without estimated median growth rates were assigned the median of the growth rates in median wages from the CPS MORG data.

The employment growth rate is the geometric annual growth rate based on the ten-year employment projection from BLS' National Employment Matrix (NEM) for 2014 to 2024 within an occupation-industry category. An alternative method is to spread the total change in the level of employment over the ten years evenly across years (constant change in the number employed). The Department believes that on average employment is more likely to grow at a constant percentage rate rather than by a constant level (a decreasing percentage rate). To account for employment growth, the Department applied the growth rates to the sample weights of the workers. This is because the Department cannot introduce new observations to the CPS MORG data to represent the newly employed.

In addition to the calculations described above, some assumptions had to be made to use these data as the basis for the analysis. For example, the Department eliminated workers who reported that their weekly hours vary and provided no additional information on hours worked. This was done because the Department cannot estimate impacts for these workers since it is unknown whether they work overtime and therefore unknown whether there would be any need to pay for overtime if their status changed from exempt to nonexempt. The Department reweighted the rest of the sample to account for this change (*i.e.*, to keep the same total employment estimates).[109] This adjustment assumes that the distribution of hours worked by workers whose hours do not vary is representative of hours worked by workers whose hours do vary. The Department believes that without more information this is an appropriate assumption.[110]

iii. Number of Workers Covered by the Department's Part 541 Regulations

To estimate the number of workers covered by the FLSA and subject to the Department's part 541 regulations, the Department excluded workers who are not protected by the FLSA or are not subject to the Department's regulations for a variety of reasons—for instance, they may not be covered by, or considered to be employees under, the FLSA. These workers include:

- Military personnel,
- unpaid volunteers,
- self-employed individuals,
- clergy and other religious workers, and
- federal employees (with a few exceptions described below).

Many of these workers are excluded from the CPS MORG: Members of the military on active duty, unpaid volunteers, and the self-employed. Religious workers were excluded from the analysis after being identified by their occupation codes: 'clergy' (Census occupational code 2040), 'directors, religious activities and education' (2050), and 'religious workers, all other' (2060). Most employees of the federal government are covered by the FLSA but are not subject to the Department's part 541 regulations because their entitlement to minimum wage and overtime pay is regulated by the Office of Personnel Management (OPM).[111] *See* 29 U.S.C. 204(f). Exceptions exist for U.S. Postal Service employees, Tennessee Valley Authority employees, and Library of Congress employees. *See* 29 U.S.C. 203(e)(2)(A). These covered federal workers were identified and included in the analysis using occupation and/or industry codes.[112] Employees of firms that have annual revenue of less than $500,000 and who are not engaged in interstate commerce are also not covered by the FLSA. The Department does not exclude them from the analysis because we have no reliable way of estimating the size of this worker population, although the Department believes it is a small percentage of workers. The 2004 Final Rule analysis similarly did not adjust for these workers.

Table 3 presents the Department's estimates of the total number of workers, and the number of workers covered by the FLSA and subject to the Department's part 541 regulations, in FY2005 and FY2017. The Department projected that in FY2017 there will be 159.9 million wage and salary workers in the United States. Of these, in the baseline scenario without changes in the salary levels, 132.8 million would be covered by the FLSA and subject to the Department's regulations (83.0 percent). The remaining 27.2 million workers would be excluded from FLSA coverage for the reasons described above and delineated in Table 4.

However, the linear trend may be flawed if there are outliers in the interim years. The Department chose to use the geometric mean because individual year fluctuations are difficult to predict and applying the geometric growth rate to each year provides a better estimate of the long-term growth in wages.

[107] The OES growth measure compared median wages in the 2006 and the 2014 OES by industry-occupation combination. The difference between the OES and CPS growth measures averaged 0.00173 percentage points, but varied by up to 15.4 percentage points, depending on the occupation-industry category.

[108] To lessen small sample bias in the estimation of the median growth rate, this rate was only calculated using CPS MORG data when these data contained at least 10 observations in each time period.

[109] The Department also reweighted for workers reporting zero earnings. The Department eliminated, without reweighting, workers who reported usually working zero hours and working zero hours in the past week.

[110] This is justifiable because demographic and employment characteristics are similar across these two populations (*e.g.*, age, gender, education, distribution across industries, share paid nonhourly). The share of all workers who stated that their hours vary (but provided no additional information) is 5.7 percent. To the extent these excluded workers are exempt, if they tend to work more overtime than other workers, then transfer payments, costs, and DWL may be underestimated. Conversely, if they work fewer overtime hours, then transfer payments, costs, and DWL may be overestimated.

[111] Federal workers are identified in the CPS MORG with the class of worker variable PEIO1COW.

[112] Postal Service employees were identified with the Census industry classification for postal service (6370). Tennessee Valley Authority employees were identified as federal workers employed in the electric power generation, transmission, and distribution industry (570) and in Kentucky, Tennessee, Mississippi, Alabama, Georgia, North Carolina, or Virginia. Library of Congress employees were identified as federal workers under Census industry 'libraries and archives' (6770) and residing in Washington, DC.

TABLE 3—ESTIMATED NUMBER OF WORKERS COVERED BY THE FLSA AND SUBJECT TO THE DEPARTMENT'S PART 541 REGULATIONS, FY2005 AND FY2017

Year	Civilian employment (1,000s)	Subject to the Department's regulations	
		Number (1,000s)	Percent
FY2005[a]	141,519	122,043	86.2
FY2017	159,914	[b] 132,754	83.0

[a] The PRIA provided figures from calendar year 2005, which differ slightly from the fiscal year 2005 figures provided in this analysis.
[b] Estimate uses pooled data for FY2013–FY2015 projected to reflect FY2017.

TABLE 4—REASON NOT SUBJECT TO THE DEPARTMENT'S PART 541 REGULATIONS, FY2017

Reason	Number (1,000s)
Total	27,160
Self-employed and unpaid workers[a]	23,607
Religious workers	550
Federal employees[b]	3,005

Note: Estimates use pooled data for FY2013–FY2015 projected to reflect FY2017.
[a] Self-employed workers (both incorporated and unincorporated) and workers "without pay" are excluded from the MORG supplement. We assume workers "without pay" are "unpaid volunteers." These workers are identified as the difference between the population of workers in the CPS basic data and the CPS MORG data.
[b] Most employees of the federal government are covered by the FLSA but are not covered by part 541. Exceptions are for U.S. Postal Service employees, Tennessee Valley Authority employees, and Library of Congress employees.

iv. Number of Workers in the Analysis

After limiting the analysis to workers covered by the FLSA and subject to the Department's part 541 regulations, several other groups of workers are identified and excluded from further analysis since they are unlikely to be affected by this Final Rule. These include:

- Blue collar workers,
- workers paid hourly, and
- workers who are exempt under certain other (non-EAP) exemptions.

The Department excludes a total of 87.9 million workers from the analysis for one or more of these reasons, which often overlapped (*e.g.*, many blue collar workers are also paid hourly). In FY2017, we project there will be 48.1 million blue collar workers (Table 5). These workers were identified in the CPS MORG data following the methodology from the U.S. Government Accountability Office's (GAO) 1999 white collar exemptions report[113] and the Department's 2004 regulatory impact analysis. *See* 69 FR 22240–44 (Table A–1). Supervisors in traditionally blue collar industries are classified as white collar workers because their duties are generally managerial or administrative, and therefore they were not excluded as blue collar workers. The Department used the CPS MORG variable PEERNHRY to determine hourly status, and determined that 78.3 million workers will be paid on an hourly basis in FY 2017.

Also excluded from further analysis were workers who are exempt under certain other (non-EAP) exemptions. Although some of these workers may also be exempt under the EAP exemptions, even if these workers lost their EAP exempt status they would remain exempt from the minimum wage and/or overtime pay provisions based on the non-EAP exemption, and thus were excluded from the analysis. We excluded an estimated 4.5 million workers, including some agricultural and transportation workers, from further analysis because they will be subject to another (non-EAP) overtime exemption. *See* Appendix A: Methodology for Estimating Exemption Status, for details on how this population was identified.

TABLE 5—ESTIMATED NUMBER OF WORKERS COVERED BY THE FLSA AND SUBJECT TO THE DEPARTMENT'S PART 541 REGULATIONS, FY2005 AND FY2017 (1,000S)

Year	Subject to DOL's Part 541 Reg.	Workers in the analysis[a]	Excluded from analysis	Reason excluded[b]				
				Blue collar workers	Hourly workers	Another exemption[c]		
						Agriculture	Transportation	Other
FY2005	122,043	39,447	82,595	45,889	73,813	778	1,911	967
FY2017	132,754	44,845	87,909	48,119	78,310	902	1,912	1,691

Note: FY2017 estimates use pooled data for FY2013–FY2015 projected to reflect FY2017.
[a] Wage and salary workers who are white collar, salaried, and not eligible for another (non-EAP) overtime exemption.
[b] Numbers do not add to total due to overlap.
[c] Eligible for another (non-EAP) overtime pay exemption.

In the 2004 Final Rule the Department excluded some of these workers from the population of potentially affected EAP workers, but not all of them. Agricultural and transportation workers are two of the largest groups of workers excluded from this analysis, and they were similarly excluded in 2004. Agricultural workers were identified by occupational-industry combination.[114] Transportation workers were defined as those who are subject to the following

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[113] GAO/HEHS. (1999). Fair Labor Standards Act: White Collar Exemptions in the Modern Work Place. GAO/HEHS–99–164, 40–41.

[114] In the 2004 Final Rule all workers in agricultural industries were excluded. 69 FR 22197. Here only workers also in select occupations were excluded since not all workers in agricultural industries qualify for the agricultural overtime pay exemptions. *See* Appendix A. This method better approximates the true number of exempt agricultural workers and provides a more conservative—*i.e.*, greater—estimate of the number of affected workers.

FLSA exemptions: Section 13(b)(1), section 13(b)(2), section 13(b)(3), section 13(b)(6), or section 13(b)(10). This methodology is the same as in the 2004 Final Rule and is explained in Appendix A. The Department excluded 902,000 agricultural workers and 1.9 million transportation workers from the analysis. In addition, the Department excluded another 1.7 million workers who fall within one or more of multiple FLSA minimum wage and overtime exemptions and are detailed in Appendix A. However, of these 1.7 million workers, all but 25,600 are either blue collar or hourly and thus the impact of excluding these workers is negligible.

v. Number of Potentially Affected EAP Workers

After excluding workers not subject to the Department's FLSA regulations and workers who are unlikely to be affected by this Final Rule (*i.e.,* blue collar workers, workers paid hourly, workers who are subject to another (non-EAP) overtime exemption), the Department estimated there would be 44.8 million salaried white collar workers for whom employers might claim either the standard EAP exemption or the HCE exemption. To be exempt under the standard EAP test the employee must:

- Be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the salary basis test); [115, 116]
- earn at least a designated salary amount; the salary level has been set at $455 per week since 2004 (the salary level test); and
- perform work activities that primarily involve executive, administrative, or professional duties as defined by the regulations (the duties test).

The 2004 Final Rule's HCE test requires the employee to pass the same standard salary basis and salary level tests. However, the HCE duties test is much less restrictive than the standard duties test, and the employee must earn at least $100,000 in total annual compensation, including at least $455 per week paid on a salary or fee basis, while the balance may be paid as nondiscretionary bonuses and commissions.

Salary Basis

As discussed above, the Department included only nonhourly workers in the analysis using the CPS variable PEERNHRY, which identifies workers as either hourly or nonhourly. For the purpose of this rulemaking, the Department considers data representing compensation paid to nonhourly workers to be an appropriate proxy for compensation paid to salaried workers. The Department notes that we made the same assumption regarding nonhourly workers in the 2004 Final Rule. *See* 69 FR 22197. Several commenters asserted that the Department's use of the CPS variable PEERNHRY to indicate whether a worker is salaried is inappropriate. For example, the NRF included an analysis it commissioned from Oxford Economics, which stated that this variable is inappropriate because all workers who earn under $455 a week (and are therefore nonexempt) will report that they are "paid at an hourly rate." The Department believes this is an entirely unwarranted assumption: exempt status is not a prerequisite for being salaried; salaried status is a prerequisite for being exempt (the salary basis test). Millions of workers—white and blue collar alike—are salaried despite being nonexempt, including 3.2 million white-collar workers who reported earning less than $455 per week in the CPS. *See* 80 FR 38522 (noting the "widespread misconception[ ]" that "payment of a salary automatically disqualifies an employee from entitlement to overtime compensation.")

Some commenters, such as the Chamber and the National Association of Convenience Stores (NACS), expressed concern that the Department is using "nonhourly" workers to approximate "salaried" workers, even though this may include workers who are paid on a piece-rate, a day-rate, or largely on bonuses or commissions. The Panel Study of Income Dynamics (PSID) provides additional information on how nonhourly workers are paid. In the PSID, respondents are asked how they are paid on their main job and are asked for more detail if their response is other than salaried or hourly. Possible responses include piecework, commission, self-employed/farmer/profits, and by the job/day/mile. The Department analyzed the PSID data and found that relatively few nonhourly workers were paid by methods other than salaried. The Department is not aware of any statistically robust source that more closely reflects salary as defined in our regulations, and the commenters did not identify any such source.

Salary Level

Weekly earnings are available in the CPS MORG data, which allowed the Department to estimate how many nonhourly workers pass the salary level tests.[117] The Fisher & Phillips law firm, Jackson Lewis law firm, NACS, and the Clearing House Association (Clearing House) commented that CPS earnings data may be inappropriate because the data includes overtime pay, commissions, or tips. The Department notes that employers may factor into an employee's salary a premium for expected overtime hours worked. To the extent they do so, that premium would be reflected in the data. Similarly, the Department believes tips will be an uncommon form of payment for these workers since tips are uncommon for white-collar workers. Lastly, the Department believes that commissions make up a relatively small share of earnings among nonhourly employees.[118] In any event, as discussed earlier in section IV.C., the Department has adopted a change to the salary basis test in this Final Rule that will newly

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[115] Hourly computer employees who earn at least $27.63 per hour and perform certain duties are exempt under section 13(a)(17) of the FLSA. These workers are considered part of the EAP exemptions but were excluded from the analysis because they are paid hourly and will not be affected by this Final Rule (these workers were similarly excluded in the 2004 analysis). Salaried computer workers are exempt if they meet the salary and duties tests applicable to the EAP exemptions, and are included in the analysis since they will be impacted by this Final Rule.

[116] Additionally, administrative and professional employees may be paid on a fee basis, as opposed to a salary basis, at a rate of at least the amount specified by the Department in the regulations. Payment on a "fee basis" occurs where an employee is paid an agreed sum for a single job regardless of the time required for its completion. § 541.605(a). Salary level test compliance for fee basis employees is assessed by determining whether the hourly rate for work performed (*i.e.,* the fee payment divided by the number of hours worked) would total at least $455 per week if the employee worked 40 hours. § 541.605(b). However, the CPS MORG does not identify workers paid on a fee basis (only hourly or nonhourly). Thus in the analysis, workers paid on a fee basis are considered with nonhourly workers and consequently classified as "salaried" (as was done in the 2004 Final Rule).

[117] The CPS MORG variable PRERNWA, which measures weekly earnings, is used to identify weekly salary. The CPS variable includes all nondiscretionary bonuses and commissions, which do not count toward the standard salary level under the current regulations but may be used to satisfy up to 10 percent of the new standard salary level when this Final Rule takes effect. This discrepancy between the earnings variable used and the FLSA definition of salary may cause a slight overestimate of the number of workers estimated to meet the standard test. Additionally, because the variable includes earnings across all jobs, this could bias upward workers' earnings on a given job. However, the Department believes this bias is small because only 4.2 percent of salaried, white collar workers hold multiple jobs.

[118] In the PSID, relatively few nonhourly workers were paid by commission. Additionally, according to the BLS Employment Cost Index (ECI), about 5 percent of the private workforce is incentive-paid workers (incentive pay is defined as payment that relates earnings to actual individual or group production). See: *http://www.bls.gov/opub/mlr/cwc/the-effect-of-incentive-pay-on-rates-of-change-in-wages-and-salaries.pdf.*

allow employers to satisfy as much as 10 percent of the standard salary level requirement for employees who meet the standard duties test through the payment of nondiscretionary bonuses, incentive payments, and commissions.

NACS also asserted that the CPS MORG earnings data are unreliable because they "are self-reported and are therefore not subject to verification." The Department acknowledges that the CPS, like all surveys, involves some measurement error. However, based on the literature measuring error in CPS earnings data, the Department believes that measurement error should not significantly bias its results.[119]

Duties

The CPS MORG data do not capture information about job duties, and at the time of writing the NPRM, there were no data available on the prevalence of EAP exempt workers. Due to this data limitation, the Department used occupational titles, combined with probability estimates of passing the duties test by occupational title, to estimate the number of workers passing the duties test. This methodology is very similar to the methodology used in the 2004 rulemaking, and was the best available data and methodology. To determine whether a worker met the duties test, the Department used an analysis performed by WHD in 1998 in response to a request from the GAO. Because WHD enforces the FLSA's overtime requirements and regularly assesses workers' exempt status, WHD's representatives were uniquely qualified to provide the analysis. The analysis was used in both the GAO's 1999 white collar exemptions report[120] and the Department's 2004 regulatory impact analysis. *See* 69 FR 22198.

WHD's representatives examined 499 occupational codes, excluding nine that were not relevant to the analysis for various reasons (one code was assigned to unemployed persons whose last job was in the Armed Forces, some codes were assigned to workers who are not FLSA covered, others had no observations). Of the remaining occupational codes, WHD's representatives determined that 251 occupational codes likely included EAP exempt workers and assigned one of four probability codes reflecting the estimated likelihood, expressed as ranges, that a worker in a specific occupation would perform duties required to meet the EAP duties tests. The Department supplemented this analysis in the 2004 Final Rule regulatory impact analysis when the HCE exemption was introduced. The Department modified the four probability codes for highly paid workers based upon our analysis of the provisions of the highly compensated test relative to the standard duties test (Table 6). To illustrate, WHD representatives assigned exempt probability code 4 to the occupation "first-line supervisors/managers of construction trades and extraction workers" (Census code 6200), which indicates that a worker in this occupation has a 0 and 10 percent likelihood of meeting the standard EAP duties test. However, if that worker earns at least $100,000 annually, he or she has a 15 percent probability of passing the shorter HCE duties test.

The occupations identified in GAO's 1999 report and used by the Department in the 2004 Final Rule map to an earlier occupational classification scheme (the 1990 Census occupational codes). Therefore, for this Final Rule, the Department used an occupational crosswalk to map the previous occupational codes to the 2002 Census occupational codes which are used in the CPS MORG 2002 through 2010 data, and to the 2010 Census occupational codes which are used in the CPS MORG FY2013 through FY2015 data.[121] If a new occupation comprises more than one previous occupation, then the new occupation's probability code is the weighted average of the previous occupations' probability codes, rounded to the closest probability code.

TABLE 6—PROBABILITY WORKER IN CATEGORY PASSES THE DUTIES TEST

Probability code	The Standard EAP test		The HCE test	
	Lower bound (%)	Upper bound (%)	Lower bound (%)	Upper bound (%)
0	0	0	0	0
1	90	100	100	100
2	50	90	94	96
3	10	50	58.4	60
4	0	10	15	15

These codes provide information on the likelihood an employee in a category met the duties test but they do not identify the workers in the CPS MORG who actually passed the test. Therefore, the Department designated workers as exempt or nonexempt based on the probabilities. For example, for every ten public relations managers, between five and nine were estimated to pass the standard duties test (based on probability category 2). However, it is unknown which of these ten workers are exempt; therefore, the Department must determine the status for these workers. Exemption status could be randomly assigned with equal probability, but this would ignore the earnings of the worker as a factor in determining the probability of exemption. The probability of qualifying for the exemption increases with earnings because higher paid workers are more likely to perform the required duties, an assumption adhered to by both the Department in the 2004 Final Rule and the GAO in its 1999 Report.[122] The Department estimated the probability of exemption for each worker as a function of both earnings and the occupation's exempt probability category using a gamma distribution.[123] Based on these revised probabilities, each worker was assigned exempt or nonexempt status based on a random draw from a binomial distribution using the worker's revised probability as the probability of success. Thus, if this method is applied to ten workers who each have a 60 percent probability of being exempt, six workers would be expected to be designated as exempt.[124] However, which particular workers are designated as exempt may vary with each set of ten random draws. For details see Appendix A.

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[119] For example, researchers have found that worker and employer reported earnings correlate 0.90 percent or higher. Bound, J., Brown, C., Mathiowetz, N. Measurement error in survey data. In *Handbook of Econometrics;* Heckman, J.J., Leamer, E.E., Eds.; North-Holland: Amsterdam, The Netherlands, V, 3705–3843.

[120] GAO/HEHS. *(1999).* Fair Labor Standards Act: White Collar Exemptions in the Modern Work Place. GAO/HEHS–99–164, 40–41.

[121] References to occupational codes in this analysis refer to the 2002 Census occupational codes. Crosswalks and methodology available at: *http://www.census.gov/people/io/methodology/.*

[122] For the standard exemption, the relationship between earnings and exemption status is not linear and is better represented with a gamma distribution. For the HCE exemption, the relationship between earnings and exemption can be well represented with a linear function because the relationship is linear at high salary levels (as determined by the Department in the 2004 Final Rule). Therefore, the gamma model and the linear model would produce similar results. *See* 69 FR 22204–08, 22215–16.

The Chamber attached to its comment an Oxford Economic analysis commissioned by the NRF, which also submitted the analysis, asserting that that CPS data may not be appropriate to determine how many workers are EAP exempt, and specifically how many pass the duties test. The Oxford Economics analysis contends that occupational titles in the CPS are less accurate than the OES survey, a BLS-published data set based on employer surveys, because the occupational titles in the CPS are self-reported, while occupational titles in the OES survey are reported by firms, and are therefore better suited to obtain information on actual occupations. Oxford Economics asserts in their Appendix A that there is title-inflation in the CPS data, which would imply that the Department's number of affected workers was overestimated. Similarly, the Chamber described the CPS job title information as based on "brief, limited individual verbal responses."

The Department acknowledges that an establishment survey (like the OES) may more accurately reflect the occupational titles applied to workers by individual employers; however, we note that businesses, like workers, may also have an incentive to inflate or deflate occupational titles. In addition, Oxford Economics and the Chamber overstate the presumed weaknesses of the CPS occupation classification. When the CPS reports occupation codes, occupation is generally determined from the initial, in-person, in-depth interview with the respondent, and the interviewer is directed to determine the respondent's duties and responsibilities, not merely accept the occupational title at face value; Census coders then assign the occupation code based on the interview.

Moreover, there are important shortcomings of the OES, which made it an inappropriate data source for the Department's purposes. First, the OES data do not include individual level data. For example, earnings are not disaggregated by respondent; only select decile estimates are presented. This does not allow estimation of the number of workers earning at least $455.[125] Second, the OES does not provide information on hours worked. In order to estimate costs and transfers using OES data, Oxford Economics had to apply estimates of hours worked from the CPS data to the OES data. This requires mapping CPS occupational titles to OES occupational titles, and therefore does not avoid use of the titles Oxford Economics finds inadequate. The Department believes the direct information on earnings and hours worked from CPS is more germane to the analysis than some potential inaccuracy in occupational titles, and will result in a more accurate analysis than trying to map worker characteristics such as data on hours worked by earnings from CPS to the OES. Finally, even if there are slight discrepancies in occupational titles, a review of the occupational titles in Appendix A of this RIA will show that closely related occupational titles are generally assigned the same probability of exemption (for example, different types of engineers are all classified as probability code 1; and cashiers and counter and rental clerks are both classified as probability code 4).

The Chamber expressed concern that the probability codes used to determine the share of workers in an occupation who are EAP exempt are 17 years old and therefore out of date. Similarly, the Economic Policy Institute (EPI) commented that we underestimated the number of exempt workers for this reason. The Department acknowledges these codes were developed in 1998 for use by the GAO in its study of the part 541 exemptions, but we believe the probability codes continue to accurately estimate exemption status given the fact that the standard duties test is not substantively different from the former short duties tests reflected in the codes.[126] The Department looked at O*NET[127] to determine the extent to which the 1998 probability codes reflected occupational duties today. The Department's review of O*NET verified the continued appropriateness of the 1998 probability codes.

The Partnership to Protect Workplace Opportunity (PPWO) cited an Edgeworth Economics article asserting that the probability codes are inappropriate because there is evidence that the relationship between salaries and job duties assumed by the Department is not valid. The article provides the following example: "the median pay of 'Occupational Therapists' is more than twice as high as the median pay of 'First Line Supervisors/Managers of Retail Sales Workers,' yet the DOL places 'Occupational Therapists' in the 10 to 50 percent category for managerial and professional duties, while 50 to 90 percent of the positions in 'First Line Supervisors/Managers of Retail Sales Workers' were determined to include managerial and professional duties." However, this criticism is not valid since the positive relationship between salary levels and passing the duties test was assumed within probability code categories, not between probability code categories. The probability codes only reflect the likelihood within an occupation of passing the duties test, not the probability of being exempt.

Potentially Affected Exempt EAP Workers

The Department estimated that of the 44.8 million salaried white collar workers considered in the analysis, 29.9 million qualified for the EAP exemptions under the current regulations (Table 7). However, some of these workers were excluded from further analysis because they would not be affected by the Final Rule. This excluded group contains workers in named occupations who are not required to pass the salary requirements

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[123] The gamma distribution was chosen because, during the 2004 revision, this non-linear distribution best fit the data compared to the other non-linear distributions considered (*i.e.*, normal and lognormal). A gamma distribution is a general type of statistical distribution that is based on two parameters that control the scale (alpha) and shape (in this context, called the rate parameter, beta).

[124] A binominal distribution is frequently used for a dichotomous variable where there are two possible outcomes; for example, whether one owns a home (outcome of 1) or does not own a home (outcome of 0). Taking a random draw from a binomial distribution results in either a zero or a one based on a probability of "success" (outcome of 1). This methodology assigns exempt status to the appropriate share of workers without biasing the results with manual assignment.

[125] Oxford Economics made assumptions to estimate the number of workers earning at least $455 per week. The firm chose to include or exclude all workers in an occupation based on whether "the threshold wage was below the 10th percentile or above the 90th percentile respectively." See Appendix A: Detailed Methodology Description, at 32, available at *https://nrf.com/sites/default/files/Documents/retail%20library/Rethinking-Overtime-Appendices.pdf.*

[126] The Chamber additionally expressed concern about the use of proxy respondents in the CPS. To check whether proxy respondents may cause biased results, the Department excluded proxy responses from the data and found that the share of potentially affected workers who are affected by the rulemaking remains very similar (it drops from 18.8 percent (*see* section VI.D.ii.) to 18.1 percent).

[127] The O*NET database contains hundreds of standardized and occupation-specific descriptions. *See www.onetcenter.org.*

(although they must still pass a duties test) and therefore whose exemption status is not dependent on their earnings. These occupations include physicians (identified with Census occupation codes 3010, 3040, 3060, 3120), lawyers (2100), teachers (occupations 2200–2550 and industries 7860 or 7870), academic administrative personnel (school counselors (occupation 2000 and industries 7860 or 7870) and educational administrators (occupation 0230 and industries 7860 or 7870)), and outside sales workers (a subset of occupation 4950).[128] Out of the 29.9 million workers who are EAP exempt, 7.4 million, or 24.8 percent, are expected to be in named occupations in FY2017. Thus these workers will be unaffected by changes in the standard salary level and HCE compensation tests. The 22.5 million EAP exempt workers remaining in the analysis are referred to in this Final Rule as "potentially affected." In addition to the 22.5 million potentially affected EAP exempt workers, the Department estimates that an additional 5.7 million salaried white collar workers who do not satisfy the duties test and who currently earn at least $455 per week but less than the updated salary level, will have their overtime protection strengthened because their exemption status will be clear based on the salary test alone without the need to examine their duties.

TABLE 7—ESTIMATED PERCENTAGES OF EAP EXEMPT WORKERS IN NAMED OCCUPATIONS, PRIOR TO RULEMAKING, FY2005 AND FY2017

Year	Workers in the analysis (millions) [a]	EAP Exempt (millions)	EAP Exempt in named occupations (millions) [b]	% of EAP exempt in named occupations
FY2005	39.4	24.9	6.4	25.9
FY2017	44.8	29.9	7.4	24.8

Note: FY2017 estimates use pooled data for FY2013–FY2015 projected to reflect FY2017.

[a] Wage and salary workers who are white collar, salaried, and not eligible for another (non-EAP) overtime exemption.

[b] Workers not subject to a salary level test include teachers, academic administrative personnel, physicians, lawyers, judges, and outside sales workers.

In response to the NPRM, the FL DEO conducted their own analysis of the number of Florida workers potentially affected by the proposed rule and asserted that the Department's analysis in the NPRM overestimates "by 195,000 the number of Florida workers who will qualify for overtime." The Department's NPRM estimated that 370,000 workers would be affected in Florida whereas the FL DEO estimated 175,100.[129] However, FL DEO did not provide details explaining how they arrived at their lower number so the Department has no way to judge the validity of their analysis or to update our own analysis to incorporate any methodological improvements that may exist in the FL DEO study.

There are three groups of workers who qualify for the EAP exemptions: (1) Those passing only the standard EAP test (*i.e.,* passing the standard duties test, the salary basis test, and the standard salary level test but not passing the HCE total annual compensation requirement); (2) those passing only the HCE test (*i.e.,* passing the HCE duties test, the salary basis test, and the HCE total annual compensation requirement but not passing the standard duties test); and (3) those passing all requirements of both the standard and HCE tests. Based on analysis of the occupational codes and CPS earnings data, the Department has concluded that in FY2017, in the baseline scenario where the rule does not change, of the 22.5 million potentially affected EAP workers, approximately 15.4 million will pass only the standard EAP test, 7.0 million will pass both the standard and the HCE tests, and approximately 100,000 will pass only the HCE test (Table 8). When impacts are discussed in section VI.D., workers who pass both tests will be considered with those who pass only the standard EAP test because the standard salary level test is lower (*i.e.,* the worker may continue to pass the standard salary level test even if he or she no longer passes the HCE total annual compensation requirement).

TABLE 8—ESTIMATED NUMBER OF WORKERS EXEMPT UNDER THE EAP EXEMPTIONS BY TEST TYPE, PRIOR TO RULEMAKING, FY2005 AND FY2017

Year	Potentially affected EAP workers (millions)			
	Total	Pass standard test only	Pass both tests	Pass HCE test only
FY2005	18.4	15.8	2.6	0.04
FY2017	22.5	15.4	7.0	0.10

Note: FY2017 estimates use pooled data for FY2013–FY2015 projected to reflect FY2017.

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[128] Some commenters asserted it is inappropriate to exclude these named occupations from the impact analysis, but not from the data set used to derive the salary level. These workers were included in the earnings distribution used to set the salary level because it achieves a sample that is more representative of EAP salary levels throughout the economy (*see* section IV.A.iv.).

[129] State level data was not included in the NPRM analysis, but was posted at the time of the NPRM publication and is available at: *https://www.whitehouse.gov/sites/default/files/docs/ot_state_by_state_fact_sheet.pdf.*

C. Determining the Revised Salary and Compensation Levels

The Final Rule sets the EAP standard salary level at the 40th percentile of the weekly earnings distribution of full-time salaried workers in the lowest-wage Census Region (currently the South) and sets the HCE total annual compensation requirement equal to the annual earnings equivalent of the 90th percentile of the weekly earnings distribution of full-time salaried workers nationally.[130] These methods were chosen in part because they generate salary levels that (1) appropriately distinguish between workers who are eligible for overtime and those who may be EAP exempt; (2) are easy to calculate and thus easy to replicate, creating transparency through simplicity; and (3) are predictable. The Department believes that the standard salary level set using the methodology established in this rulemaking allows for reliance on the current standard duties test without necessitating a return to the more detailed long duties test. Additionally, the Department believes this salary level will not result in an unacceptably high risk that employees performing bona fide EAP duties will become entitled to overtime protection by virtue of the salary test.

In the NPRM, the Department proposed setting the EAP standard salary level at the 40th percentile of the weekly earnings distribution of full-time salaried workers nationally. In response to commenters' concerns that the proposed salary level would disqualify too many bona fide EAP employees in low-wage areas and industries, the Department limited the distribution to workers in the lowest-wage Census Region.

i. Methodology for the Standard Salary Level and Comparison to Past Methodologies

The Department in this rulemaking is setting the standard salary level at the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (currently the South). This methodology differs somewhat from previous revisions to the salary levels but the general concept holds: Define a relevant population of workers, estimate an earnings distribution for that population, then set a salary level that corresponds to a designated percentile of that distribution in order for the salary to serve as a meaningful line of demarcation between those Congress intended to protect and those who may qualify for exemption. The salary setting methodology adopted in this Final Rule continues the evolution of the Department's approach. Where the methodology differs from past methodologies, the Department believes the changes are an improvement. A comparison of this new method with methods from past rulemakings, and the reasons for selecting the new method are detailed in the rest of this section.

As discussed in section IV.A., the historical methodologies used to revise the EAP salary levels have varied somewhat across the seven updates to the salary level test since it was implemented in 1938. To guide the determination of the salary level, the Department considered methodologies used previously to revise the EAP salary levels. In particular, the Department focused on the 1958 revisions and the most recent revisions in 2004. The 1958 methodology is particularly instructive in that it synthesized previous approaches to setting the long-test salary level, and the basic structures it adopted have been a touchstone to setting the long test salary level in subsequent rulemakings (with the exception of 1975).

In 1958, the Department updated the salary levels based on a 1958 Report and Recommendations on Proposed Revision of Regulations, Part 541, by Harry S. Kantor (Kantor Report). To determine the revised salary levels the Department looked at data collected during WHD investigations on actual salaries paid to exempt EAP employees, grouped by geographic region, industry groups, number of employees, and size of city. The Department then set the long test salary levels so that no more than about 10 percent of exempt EAP employees in the lowest-wage region, lowest-wage industry, smallest establishment group, or smallest city group would fail to meet the test. Kantor Report at 6–7.[131] [132] The Department then set the short test salary level in relation to, and significantly higher than, the long test salary levels. This methodology is referred to as the Kantor method, and the Department followed a similar methodology in setting the salary levels in 1963 and 1970.

A significant change in 2004 from the long test Kantor method was that the Department used the salaries of both exempt and nonexempt full-time salaried workers in the South and the retail industry to determine the required salary level (hereafter referred to as the 2004 method), rather than the salaries of exempt workers only. However, because the salaries of exempt workers on average are higher than the salaries of all full-time salaried workers, the Department selected a higher earnings percentile when setting the required salary. Based on the Department's 2004 analysis, the 20th percentile of earnings for exempt and nonexempt full-time salaried workers in the South and retail achieved a result very similar to the 10th percentile for workers in the lowest-wage regions and industries who were estimated to be exempt. *See* 69 FR 22169.

In the current rulemaking, the Department replicated the Kantor long test method and the 2004 method to evaluate and compare them to the chosen salary level.[133] Although the Department was able to replicate the 1958 and 2004 methods reasonably well, we could not completely replicate those methods due to changes in data availability, occupation classification systems, and incomplete documentation. In general, there are four steps in the process:

1. Identify workers likely to be members of the population of interest.
2. Further narrow the population of interest by distinguishing the sub-population employed in low-wage categories.
3. Estimate the distribution of earnings for these workers.
4. Identify the salary level that is equal to a pre-determined percentile of the distribution.

The population of workers considered for purposes of setting the salary level depends on whether the 2004 method or the Kantor long test method is used. In replicating both methods, the Department limited the population to workers subject to the FLSA and covered by the Department's part 541 provisions, and excluded exempt EAP workers in named occupations, and those exempt under another (non-EAP) exemption. For the 2004 method, the

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[130] On a quarterly basis, BLS publishes a table of deciles of the weekly wages of full-time nonhourly workers, calculated using CPS data, which employers can use to help anticipate the likely amount of automatically updated salary levels. *See http://www.bls.gov/cps/research_series_earnings_nonhourly_workers.htm.*

[131] The Kantor long test method was based on an analysis of a survey of exempt workers as determined by investigations conducted by WHD. Subsequent analyses, including both the 2004 rulemaking and this Final Rule, have estimated exempt status using multiple data sources.

[132] Because the salary level test is likely to have the largest impact on the low-wage segments of the economy (*e.g.,* low-wage regions and industries), salaries in those segments were selected as the basis for the required salary level under the Kantor long test method.

[133] The Department followed the same methodology used in the 2004 Final Rule for estimating the Kantor long test method with minor adjustments. In an attempt to more accurately estimate the Kantor long test method, for example, this analysis included non-MSAs as a low-wage sector as Kantor did but the 2004 revisions did not.

Department further limited the population to full-time salaried workers, and for the Kantor long test method further limited the population of interest by only including those workers determined as likely to be EAP exempt (*see* more detailed methodology in section VI.C. and Appendix A).

In the 2004 Final Rule, the Department identified two low-wage categories: The South (low-wage geographic region), and the retail industry (low-wage industry). In the current rulemaking, the Department identified low-wage categories by comparing average weekly earnings across categories for the populations of workers used in the Kantor long test method and the 2004 method. The South was determined to be the lowest-wage Census Region and was used for the 2004 method; however, the Department chose to use a more detailed geographical break-down for the Kantor long test method to reflect the geographic categories Kantor used. Therefore, for the Kantor long test method the East South Central Census Division is considered the lowest-wage geographical area.[134] The Department used three low-wage industries: Leisure and hospitality, other services, and public administration.[135] The Department also considered non-MSAs as a low-wage sector in the Kantor long test method. The 2004 revision did not consider population density but the Kantor long test method examined earnings across population size groups. In conclusion, for this analysis the 2004 method looks at workers in the South and the three low-wage industries, whereas the Kantor long test method looks at workers in the East South Central Division, non-MSAs, and the three low-wage industries.

Next, the Department estimated the distributions of weekly earnings of two populations: (1) Workers who are in at least one of the low-wage categories and in the Kantor population (likely exempt workers), and (2) workers who are in at least one of the low-wage categories and in the 2004 population (full-time salaried workers). From these distributions, alternate salary levels were identified based on pre-determined percentiles. For the Kantor long test method, the salary level for the long duties test is identified based on the 10th percentile of weekly earnings for likely EAP exempt workers, while the 2004 method salary level is identified based on the 20th percentile of weekly earnings for both exempt and nonexempt salaried workers. Using 2015 quarter 3 CPS MORG data, the Kantor long test method resulted in a salary level of $684 per week, and the 2004 method resulted in a salary level of $596 per week.[136] Table 9 presents the distributions of weekly earnings used to estimate the salary levels under the method used in this Final Rule, the NPRM method, the 2004 method, and the Kantor long test method.

TABLE 9—WEEKLY EARNINGS DISTRIBUTIONS

Percentile	Weekly earnings				Annual earnings [a]			
	Full-time salaried 2015Q4 [b]		2004 Method 2015Q3 [c]	Kantor Long Test Method 2015Q3 [d]	Full-time salaried 2015Q4 [b]		2004 Method 2015Q3 [c]	Kantor Long Test Method 2015Q3 [d]
	South	Nationally			South	Nationally		
10	$479	$509	$429	$684	$24,908	$26,468	$22,319	$35,560
20	633	692	596	817	32,916	35,984	31,015	42,491
30	768	838	726	949	39,936	43,576	37,749	49,332
40	913	972	844	1,110	47,476	50,544	43,878	57,739
50	1,054	1,146	988	1,259	54,808	59,592	51,381	65,451

[a] Weekly earnings multiplied by 52.

[b] BLS. Available at: *http://www.bls.gov/cps/research_series_earnings_nonhourly_workers.htm.*

[c] Full-time salaried workers in the South or employed in a low-wage industry (excludes workers not subject to the FLSA, not subject to the salary level test, and in agriculture or transportation). Quarter 3 was used instead of Q4 because at the time of the analysis this was the most recently available data.

[d] Salaried, white collar workers who earn at least $455 per week, pass the EAP duties test, and either live in the East South Central Division or a non-MSA or are employed in a low-wage industry (excludes workers not subject to FLSA, not subject to the salary level test, and in agriculture or transportation). Quarter 3 was used instead of Q4 because at the time of the analysis this was the most recently available data.

In response to the NPRM, the Iowa Association of Business and Industry (IABI) commented that the Department incorrectly replicated the Kantor long test methodology. Kantor determined the salary levels by looking separately at low-wage regions, less populated geographic regions, and low-wage industries and then identifying a single salary level that fits within these salary numbers. IABI asserted that we misapplied the methodology by aggregating these low-wage sectors into a single group. The Department disagrees with IABI that we misapplied the Kantor long-test methodology. As discussed at length in the NPRM, the Department replicated the Kantor methodology as closely as possible given changes in data availability. *See* 80 FR 38557.

ii. Rationale for the Methodology Chosen

The chosen methodology—the 40th percentile of full-time salaried workers in the lowest-wage Census Region—was selected because it (1) corrects for the elimination of the long duties test and allows for reliance on the current standard duties test; (2) appropriately distinguishes between workers who are eligible for overtime and those who may be EAP exempt in all regions and industries; (3) is easy to calculate and thus easy to replicate, creating transparency through simplicity; and (4) produces predictable salary levels.

The salary level test has historically been intended to serve as an initial bright-line test for overtime eligibility for white collar employees. As discussed previously, however, there will always be white collar overtime-eligible employees who are paid above the salary threshold. A low salary level increases the number of these employees. The necessity of applying the duties test to these overtime-protected employees consumes employer resources, may result in misclassification (which imposes additional costs to employers and society in the form of litigation), and is an indicator of the effectiveness of the salary level. Similarly, there will always be employees performing bona fide EAP duties who are paid below the salary threshold; the inability of employers to claim the EAP exemption for these employees is also an indicator of the effectiveness of the salary level. Selecting the standard salary level will inevitably affect the number of workers falling into each of these two categories.

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[134] The East South Central Division is a subset of the South and includes Alabama, Kentucky, Mississippi, and Tennessee. If the South is used instead, the resulting salary levels would increase slightly.

[135] In the NPRM, the Department found that the industry with the lowest mean weekly earnings depends on whether the Kantor long test method or the 2004 method's population was used. Therefore, three industries were considered low-wage. For the Final Rule, the "other services" industry was consistently the lowest-wage industry. However, the Department continues to use all three low-wage industries for consistency and because these three continue to be the three lowest-wage industries.

[136] Quarter 3 was used instead of quarter 4, which was used for the distribution of all full-time salaried workers, because at the time the analysis was conducted this was the most recently available data.

1. Correcting for the Elimination of the Long Duties Test

The Kantor long test method sought to minimize the number of white collar employees who pass the long duties test but were excluded from the exemption by the salary threshold and therefore set the salary level at the bottom 10 percent of earnings of exempt EAP employees in low-wage regions and industries so as to prevent "disqualifying any substantial number of such employees." Kantor Report at 5. This method was based on the long/short test structure, in which employees paid at lower salary levels were protected by significantly more rigorous duties requirements than are part of the current standard duties test. This approach, however, does not sufficiently take into account the inefficiencies of applying the duties test to large numbers of overtime-eligible white collar employees and the possibility of misclassification of those employees as exempt.

As discussed in section IV.A., for many decades the long duties test—which limited the amount of time an exempt employee could spend on nonexempt duties and was paired with a lower salary level—existed in tandem with a short duties test—which did not contain a specific limit on the amount of nonexempt work and was paired with a significantly higher salary level. In 2004, the Department eliminated the long and short duties tests and created the new standard duties test, based on the short duties test. The creation of a single standard test that did not limit nonexempt work caused new uncertainty as to what salary level is sufficient to ensure that employees intended to be overtime-protected are not subject to inappropriate classification as exempt, while minimizing the number of employees disqualified from the exemption even though their primary duty is EAP exempt work.

In the Final Rule, the Department corrects for the elimination of the long duties test and sets a salary level that works in tandem with the standard duties test to appropriately classify white collar workers as entitled to minimum wage and overtime protection or potentially exempt. Thus, while the standard salary level set by the Department is higher than the level the Kantor long test or 2004 methods would generate, it is set at the low end of the range of the historical short test levels, based on the ratios between the short test and long test levels, and much lower than the historical average for the short test. Between 1949 and 2003, the ratio of the short to long salary tests ranged from approximately 130 percent to 180 percent. The low end of this range would result in a salary level of $889; the high end would result in a salary of $1,231 (measured in FY2015 dollars). The short salary level updates between 1949 and 2003 averaged $1,100 per week (measured in FY2015 dollars).[137] At the 40th percentile of weekly earnings of full-time workers in the South, 9.9 million white collar employees would no longer be subject to the standard duties test (4.2 million currently EAP exempt employees who would be newly entitled to overtime protection due to the increase in the salary threshold and 5.7 million overtime eligible white collar employees who are paid between $455 and $913 per week whose exemption status would no longer depend on the application of the duties test). As discussed in section IV.A.iv., the Department believes that many of the workers who will no longer be exempt are currently inappropriately classified because of the mismatch between the standard duties test and the standard salary level. The final salary threshold will therefore more efficiently distinguish between employees who may meet the duties requirement of the EAP exemption and those who do not, without necessitating a return to the more detailed long duties test.

2. Appropriately Distinguishing Overtime-Eligible White Collar Workers and Those Who May Be EAP Exempt

The revised salary level also reduces the likelihood of workers being misclassified as exempt from overtime pay, providing an additional measure of the effectiveness of the salary level as a bright-line test delineating exempt and nonexempt workers. In the NPRM, the Department estimated that 13.5 percent of overtime-eligible white collar workers earning between the current salary level and the proposed salary level were misclassified. 80 FR 38559.

The Department updated our estimate of potential misclassification based on the salary level set in this Final Rule. The Department's analysis of misclassification draws on CPS data and looked at workers who are white collar, salaried, subject to the FLSA and covered by part 541 regulations, earn at least $455 but less than $913 per week, and fail the duties test. Because only workers who work overtime may receive overtime pay, when determining the share of workers who are misclassified the sample was limited to those who usually work overtime.[138] Workers were considered misclassified if they did not receive overtime pay.[139] The Department estimates that 12.8 percent of workers in this analysis who usually work overtime do not receive overtime compensation and are therefore misclassified as exempt. Applying this estimate to the sample of white collar salaried workers who fail the duties test and earn at least $455 but less than $913, the Department estimates that there are approximately 732,000 white collar salaried workers earning at least $455 but less than $913 who are overtime-eligible but whose employers do not recognize them as such.[140] These employees' entitlement to overtime pay will now be abundantly evident.

Table 10 provides estimates of the extent of misclassification of workers as exempt among first-line supervisors/managers in a variety of industries using the same method of looking at white collar salaried employees who fail the duties test and who report working more than 40 hours a week but do not report receiving overtime compensation.[141] The Department's analysis found that 41 percent of first-line supervisors/managers of food preparation and serving workers, and 35 percent of first-line supervisors/managers of retail sales workers are misclassified.

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[137] This is the average of the values of the short test salary level inflated to 2015 dollars.

[138] We have excluded workers who are in named occupations or are exempt under another non-EAP exemption.

[139] Overtime pay status was based on worker responses to the CPS MORG question concerning whether they receive overtime pay, tips, or commissions at their job ("PEERNUOT" variable).

[140] The Department applies the misclassification estimate derived here to both the group of workers who usually work more than 40 hours and to those who do not.

[141] The occupational category of first-line supervisors and managers illustrates the concept across a range of industries. This category of workers may be susceptible to potential misclassification because they are the first level of management above overtime-protected line workers.

The Department also found that the industries with the largest number of workers who fail the duties test and report working more than 40 hours a week but do not receive overtime compensation are retail trade (125,000 workers) and food services and drinking places (97,000 workers). In these industries, the Department estimates the rate of misclassification to be 41percent of food services and drinking workers and 18 percent of retail workers.

TABLE 10—ESTIMATES OF MISCLASSIFICATION AMONG FIRST-LINE SUPERVISORS AND MANAGERS COVERED BY THE FINAL RULE WHO EARN AT LEAST $455 AND LESS THAN $913

First-line supervisors/manager occupations	Overtime eligible salaried workers who earn between $455 and $913 per week (1,000s)	Percent who usually work >40 hours [a]	Percent misclassified [b]
Total	5,697	15.0	12.8
First-line supervisors/managers of . . .			
Retail sales workers	208.5	39.9	34.6
Non-retail sales workers	66.0	32.6	27.5
Production and operating workers	62.4	26.3	24.0
Construction trades and extraction workers	58.5	19.9	19.0
Food preparation and serving workers	55.5	44.9	41.0
Housekeeping and janitorial workers	35.0	22.0	17.2
Mechanics, installers, and repairers	28.9	29.2	27.6
Office and administrative support workers	26.9	14.0	13.1
Personal service workers	21.0	31.5	24.3
Landscaping, lawn service, and grounds keeping workers	17.4	29.3	26.0

Source: CPS extract. Workers who are white collar, salaried, subject to the FLSA and covered by the part 541 regulations, earn at least $455 but less than $913 per week, and fail the duties test.

[a] Percent of overtime eligible salaried workers who usually work more than 40 hours per week. This differs from the 40 percent of all workers who work more than 40 hours in a week at least once per year because it only includes overtime eligible workers and excludes occasional overtime workers.

[b] Share of respondents who report usually working more than 40 hours per week and do not report that they "usually receive overtime pay, tips, or commissions."

Since the NPRM was published, RAND has conducted a survey to identify the number of workers who may be misclassified as EAP exempt. The survey, a special module to the American Life Panel, asks respondents (1) hours worked, (2) whether they are paid on an hourly or salary basis, (3) their typical earnings, (4) whether they perform certain job responsibilities that are treated as proxies for whether they would justify exempt status, and (5) whether they receive any overtime pay. Using these data, Susann Rohwedder and Jeffrey B. Wenger[142] found "11.5 percent of salaried workers were classified as exempt by their employer although they did not meet the criteria for being so." Using RAND's estimate of the rate of misclassification (11.5 percent), at the new salary level, the Department estimates that approximately 1.8 million salaried workers earning between $455 and $913 per week who fail the standard duties test are currently misclassified as exempt.[143]

The Department also assessed the impact of the standard salary level as a bright-line test for EAP exemption by examining: (1) The number of salaried white collar workers who pass the standard salary level test but not the duties test and (2) the number of salaried white collar workers who pass the standard duties test but not the salary level test.[144] This first group is equivalent to the number of salaried white collar workers who are eligible for overtime pay because they do not pass the standard EAP duties test, but earn above a specific salary level. The second group is the number of salaried white collar workers who satisfy the standard duties test but earn less than a specific standard salary level. The Department makes this assessment at the current salary level ($455) and the final salary level ($913), while holding all other factors determining exempt status constant (*e.g.,* not considering whether the duties test is correctly applied or potential employer response to the change in the salary level test). Examining the impact of the salary threshold in isolation from the application of the duties test or employer adjustments to pay or hours does not provide a complete picture of the impact of a new salary threshold. It does, however, allow the Department to evaluate the effectiveness of the salary level in protecting overtime-eligible white collar employees without unduly excluding from the exemption employees performing EAP duties.

As a benchmark, the Department estimates that at the current standard salary threshold, there are 12.2 million salaried white collar workers who fail the standard duties test and are therefore overtime eligible, but earn at least the $455 threshold, while there are only 838,000 salaried white collar workers who pass the standard duties test but earn less than the $455 level. Thus the number of salaried white collar workers who pass the current salary threshold test but not the duties test is nearly 15 times the number of salaried white collar workers who pass the duties test but are paid below the salary threshold. This underscores the large number of overtime-eligible workers for whom employers must perform a duties analysis, and who may be at risk of misclassification as EAP exempt. At a salary threshold equal to the 40th percentile of full-time salaried workers in the South ($913), the number of overtime-eligible salaried white collar workers who would earn at least the threshold but do not pass the duties test would be reduced almost in half to 6.5 million (approximately 47 percent of all white collar salaried employees who fail the duties test). At a salary level of $913, the number of salaried white collar workers who would pass the standard duties test but earn less than the salary level would increase to 5.0 million (approximately 22 percent of all white collar salaried employees who pass the standard duties test). While this number is higher than the number of such employees under the Kantor long test method (approximately 10 percent), it includes employees who would have been overtime-eligible because they would not have passed the more rigorous long duties test, which had a cap on the percentage of time an employee could spend on nonexempt duties, and therefore were not included under that approach. Further, the number of salaried white collar workers who pass the new salary threshold test but not the duties test (6.5 million) is 31 percent higher than the number of salaried white collar workers who pass the duties test but are paid below the salary threshold (5.0 million).

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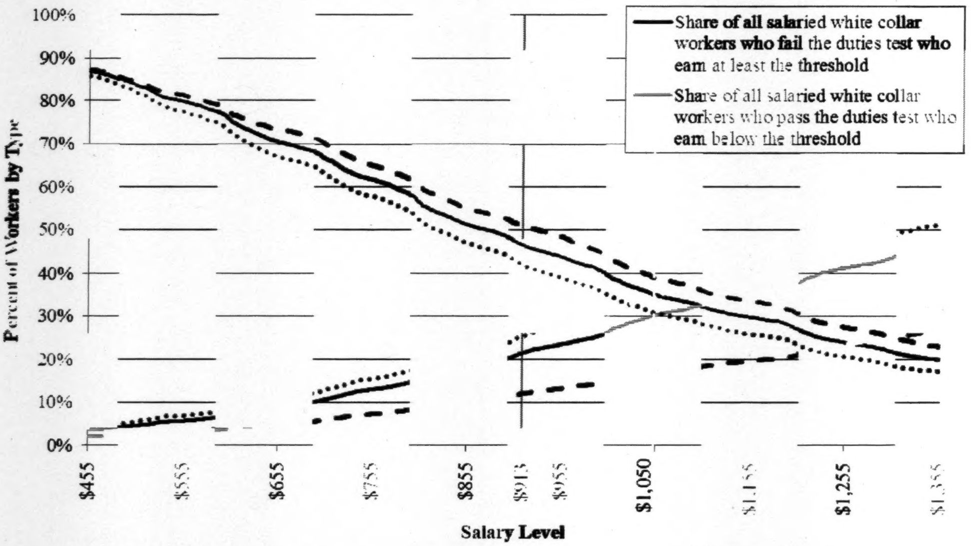
[142] Rohwedder, S. and Wenger, J.B. (2015). The Fair Labor Standards Act: Worker Misclassification and the Hours and Earnings Effects of Expanded Coverage. RAND Labor and Population.

[143] The number of misclassified workers estimated based on the RAND research cannot be directly compared to the Department's estimates because of differences in data, methodology, and assumptions. Although it is impossible to reconcile the two different approaches without further information, by calculating misclassified workers as a percent of all salaried workers in its sample, RAND uses a larger denominator than the Department. If calculated on a more directly comparable basis, the Department expects the RAND estimate of the misclassification rate would still be higher than the Department's estimate.

[144] These populations are limited to salaried, white collar workers subject to the FLSA and the Department's part 541 regulations, and not eligible for another (non-EAP) exemption, not in a named occupation, and not HCE only.

Figure 3: Percentage of White Collar Salaried Workers by Earnings and Duties Test Status for National, Highest-Wage, and Lowest-Wage Regions

Figure 3: Percentage of White Collar Salaried Workers by Earnings and Duties Test Status for National, Highest-Wage, and Lowest –Wage Regions



Note: Solid lines are for the national level. Striped lines are for the highest-wage Region (West) and dotted lines are for the lowest-wage Region (South). Vertical lines indicate the salary levels using the South and the West ($1,050).

As illustrated in Figure 3, as the salary threshold increases there is a decrease in the share of overtime-eligible white collar workers for whom employers would be required to make an assessment under the duties test and who would be subject to possible misclassification (descending lines). At the same time, as the salary level increases there is an increase in the share of salaried white collar workers who pass the standard duties test but are screened from exemption by the salary threshold (ascending lines).[145] As previously discussed, the increase in the share from the traditional 10 percent of exempt employees excluded by the Kantor long test method reflects the shift to a salary level appropriate to the standard duties test. Because the long duties test included a limit on the amount of nonexempt work that could be performed, it could be paired with a low salary that excluded few employees performing EAP duties. In the absences of such a limitation in the duties test, it is necessary to set the salary level higher (resulting in the exclusion of more employees performing EAP duties) because the salary level must perform more of the screening function previously performed by the long duties test.

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[145] Of employees who are paid on a salary basis of at least $455 per week and meet the standard duties test, approximately 81 percent earn at least the new level of $913 per week. Conversely, among overtime-eligible salaried white collar employees earning at least $455 per week, approximately 47 percent earn less than the new salary level.

At the current salary level (far left of Figure 3), there is a very large gap between salaried white collar workers who are overtime eligible but earn at least the threshold (about 87 percent of all salaried white collar workers who fail the duties test are paid at least $455 per week) and salaried white collar workers who pass the standard duties test but do not meet the current salary level (about 4 percent of all salaried white collar workers who pass the duties test are paid less than $455 per week). At the salary level of the 40th percentile of weekly earnings of full-time salaried workers in the South ($913 per week), the percentage of overtime-eligible salaried white collar workers who earn above the threshold (and thus would be at risk of misclassification) still remains higher than the percentage of salaried white collar workers who pass the duties test but earn less than the salary threshold (and would become overtime protected).[146] The salary threshold would have to be considerably higher (at a weekly salary level of approximately $1,100) before the percentage of salaried white collar workers who earn less than the threshold but pass the duties test would equal the percentage who are overtime eligible but earn at least the salary threshold. While some commenters favored setting the salary level at this intersection point, the Department concludes that the resulting salary level would unduly impact low-wage regions and industries.

The Department has also looked at the impact of the new salary level on these two groups of workers in low-wage (East South Central) and high-wage (Pacific) Census divisions in addition to nationally.[147] For the East South Central Census division, the salary level at which the percentages of the two groups are about equal is approximately $995 per week, while in the Pacific Census division, the salary at which the percentages of the two groups are equal is approximately $1,217 per week. The Department's new salary level of the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region ($913 per week) falls below the estimate for the East South Central division. This further supports that the Department's change in the Final Rule to the lowest-wage Census Region establishes a salary level that is appropriate for classifying workers as entitled to minimum wage and overtime pay or potentially exempt in even the lowest wage areas.

3. Simplicity and Transparency

The method of basing the standard salary threshold on a particular percentile of weekly earnings of full-time salaried employees in the lowest-wage Census Region involves less estimation than previous updates, making it easier to implement, less prone to error, and more transparent than before. The method reduces computation by simplifying the classification of workers to just two criteria: wage or salaried, and full-time or part-time. Application of the Kantor long test method, in particular, would involve significant work to replicate since one would need to identify likely EAP exempt workers, a process which requires applying the standard duties test to determine the population of workers used in the earnings distribution. In addition, both the Kantor long test and 2004 methods exclude workers not subject to the FLSA, not subject to the salary level test, or in agriculture or transportation. The method adopted in this Final Rule is easier for stakeholders to replicate and understand because the standard duties test does not need to be applied to determine the population of workers used in the earnings distribution.

International Foodservice Distributors Association, IABI, and others criticized the Department for not restricting the CPS sample to workers subject to the part 541 regulations or subject to the salary level test. As explained in section IV.A.iv., the Department believes these white collar professionals are part of the universe of executive, administrative, and professional employees who Congress intended to exempt from the FLSA's minimum wage and overtime requirements and including them in the data set achieves a sample that is more representative of EAP salary levels throughout the economy.

4. Consistency and Predictability

A method that produces very different salary levels in consecutive years may reduce confidence that the salary levels in any given year are optimal. The growth rate using the Kantor long test method varies across years. The primary reason for this is because the Kantor long test method—or any other method that limits the data set to currently exempt workers—uses the value of the current salary level test to identify the population of workers from which the earnings distribution is determined. Therefore, the Kantor long test method limits the pool of workers in the sample used to set the salary level to those who meet the currently required salary level, while the 2004 method and the new method implemented in this Final Rule do not exclude workers with salaries below the current salary level. Since FY2004, the salary levels that would have been generated by the Kantor method increased by 3.6 percent on average annually.[148] Conversely, since FY2004, the 40th percentile of earnings of full-time salaried workers in the South has increased by an average of 2.4 percent annually. Similarly, the salary levels that would have been generated by the 2004 method (keeping low-wage sectors constant) increased 2.5 percent annually on average. This explains why the salary levels generated by the Kantor long test method and the 2004 method have diverged significantly since 2004 (in the third quarter of 2015, Kantor = $684; 2004 = $596).

For example, in 2003 the Kantor long test method's population of interest was limited to workers earning at least $155 per week (the 1975 long test salary level); in this Final Rule the Kantor long test method's population was restricted to workers earning at least $455 per week. Therefore the population considered in the Kantor long test method changes each time the salary level is changed. The Department's Final Rule, like the 2004 method, considers all full-time salaried workers and does not limit the pool to only those workers who meet the current salary level test, thus avoiding this potential shortcoming of the Kantor long test method.

iii. Standard Salary Levels With Alternative Methodologies

When assessing the standard salary level, the Department evaluated several alternatives in addition to the level chosen. This section presents the alternative salary levels considered and the bases for identifying those alternative levels. While commenters proposed other methods for calculating the salary level, the Department determined that these alternatives remained the best comparators for evaluating the chosen salary level methodology. As shown in Table 11, the alternative salary levels evaluated are:

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[146] Approximately 47 percent of white collar salaried workers who do not pass the duties test earn at least the new salary level ($913 per week). Conversely, approximately 22 percent of employees who pass the standard duties test earn less than the new salary level.

[147] Of the nine Census divisions, the East South Central and Pacific divisions correspond to the divisions with the lowest and highest earnings using the Kantor long test method. The East South Central includes Alabama, Kentucky, Mississippi, and Tennessee. The Pacific includes Alaska, California, Hawaii, Oregon, and Washington.

[148] Values calculated using geometric growth rates and starting in FY2004, the last time the salary level was increased.

- Alternative 1: Inflate the 2004 weekly salary level to FY2015 dollars, which results in a salary level of $570 per week.
- Alternative 2: Use the 2004 method to set the salary level at $596 per week.
- Alternative 3: Use the Kantor long test level of $684 per week.
- Alternative 4: Use the 40th earnings percentile of full-time salaried workers nationally. This was the methodology proposed in the NPRM. This results in a salary level of $972 per week.
- Alternative 5: Adjust the salary level from the Kantor long test method to reflect the average historical ratio between the long and short test salary levels. This results in a salary level of $1,019 per week.
- Alternative 6: Inflate the 1975 short duties test salary level, which is $1,100 in FY2015 dollars.

TABLE 11—STANDARD SALARY LEVEL AND ALTERNATIVES, FY2017

Alternative	Salary level (weekly/annually)	Total increase [a]	
		$	%
Alt. #1: Inflate 2004 level [b]	$570/$29,640	115	25.3
Alt. #2: 2004 method [c]	596/31,015	141	31.1
Alt. #3: Kantor long test [c]	684/35,568	229	50.3
Final Rule method (40th percentile of full-time salaried workers in lowest-wage Census Region)	913/47,476	458	100.7
Alt. #4: 40th percentile of full-time salaried workers nationally	972/50,544	517	113.6
Alt. #5: Kantor short test [c]	1,019/52,984	564	123.9
Alt. #6: Inflate 1975 short test level [b]	1,100/57,205	645	141.8

[a] Change between salary level or alternative and the salary level set in 2004 ($455 per week).
[b] Value in FY2015$. Inflated using CPI–U to FY2015$ (most recent data available).
[c] Data for 2015, quarter 3.

Alternative 1 inflates the 2004 standard salary level ($455) to FY2015 dollars using the CPI–U. This produces a salary level of $570 per week. As noted above, the 2004 method sets the standard salary level at approximately the 20th percentile of full-time salaried workers in the South and retail industry. Alternative 2 applies this methodology to more recent data (quarter 3 of 2015), resulting in a salary level of $596 per week. Alternative 3 produces the salary level using the Kantor method for the long duties test, resulting in a level of $684 per week. As we explain earlier in the preamble, the Department rejected the use of these alternatives because they pair a salary level appropriate for use with the long duties test with a duties test appropriate for use with the short test salary.

Alternative 4 sets the standard salary equal to the 40th percentile of weekly earnings of all full-time salaried workers nationally. This is the approach that the Department proposed in the NPRM. This alternative uses the same methodology as this Final Rule—setting the salary level at the 40th percentile of earnings—but uses a data set including full-time salaried workers nationwide instead of limiting the population to the lowest-wage Census Region. The 40th percentile of earnings of all full-time salaried workers nationally, in the fourth quarter of 2015, is $972. As discussed in more detail in section IV.A.iv., the Department declined to adopt this method in response to commenters' concerns that the proposed salary level could disproportionately impact workers in low-wage regions and industries by inappropriately excluding from exemption too many workers who meet the duties test.

Alternative 5 (Kantor short test) is also based on the Kantor method but, whereas alternative 3 generates the salary level associated with the long duties test, alternative 5 generates a level more closely resembling the salary associated with the short duties test, which the Department set as a function of the Kantor long test. In the 2004 Final Rule, the Department replaced the structure of separate short and long duties tests with a single standard duties test based on the less restrictive short duties test, which had historically been paired with a higher salary level test. However, the Department set the standard salary level in 2004 at a level that was equivalent to the Kantor long test salary level, which was associated with the long duties test and limited the amount of nonexempt work that the employee could perform. In alternative 5, the Department therefore considered revising the standard salary level to approximate the short test salary that better matches the standard duties test. On average, the salary levels set in 1949 through 1975 were 149 percent higher for the short test than the long test. Therefore, the Department inflated the Kantor estimate of $684 by 149 percent, which generated a short salary level equivalent of $1,019 per week.[149] While the Department used the average difference between the Kantor short and long tests for this alternative, the ratio of the short to long salary tests ranged from approximately 130 percent to 180 percent between 1949 and 2004. The low end of this range would result in a weekly salary of $889; the high end would result in a salary of $1,231. The Department rejected the use of the Kantor short test, as explained in this preamble, because we concluded that a standard salary level of $1,019 per week might exclude from exemption too many bona fide EAP workers in certain regions or industries.

Alternative 6 inflates the 1975 short duties test salary level to $1,100 per week in FY2015 dollars. Similar to alternative 5, the Department rejected the use of a short test salary level due to the concern that it might exclude from exemption too many bona fide EAP workers in certain regions or industries.

Section VI.D. details the transfers, costs, and benefits of the new salary level and the above alternatives. A comparison of the costs and benefits supports the Department's decision to set the standard salary level of the 40th percentile of weekly earnings of all full-time salaried workers in the South ($913 per week).

iv. Methodology for the HCE Total Annual Compensation Level and Alternative Methods

The Department sets the HCE compensation level equal to the annual equivalent of the 90th percentile of the distribution of earnings of all full-time salaried workers nationally. BLS calculated the salary level from the CPS MORG data by limiting the population to nonhourly workers who work full-time (*i.e.*, at least 35 hours per week) and determining the 90th percentile of the resulting weighted weekly earnings distribution. The 90th percentile of weekly earnings in the fourth quarter of 2015 was $2,577. This was then multiplied by 52 to determine the annual earnings equivalent ($134,004). This method uses a percentile towards the top of the nationwide earnings distribution to reflect the minimal duties criteria associated with the highly compensated employee exemption.

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[149] The Department estimated the average historic ratio of 149 percent as the simple average of the fifteen historical ratios of the short duties salary level to the long duties salary level (salary levels were set in 5 years and in each year the salary level varied between the three exemptions: executive, administrative, and professional). If the Department had weighted the average ratio based on the length of time the historic salary levels were in effect, this would have yielded an average historic ratio of 152 percent and a salary level of $1,039.

The Department also evaluated the following alternative HCE compensation levels:

- HCE alternative 1: Leave the HCE compensation level unchanged at $100,000 per year.
- HCE alternative 2: Inflate the 2004 level using CPI–U to $125,320 per year in FY2015 dollars.
- HCE alternative 3: Set the HCE compensation level at $149,894 per year, which is approximately the annualized level of weekly earnings exceeded by 6.3 percent of full-time salaried workers. This is the same percent of such workers that exceeded the HCE compensation level in 2004. *See* 69 FR 22169.

The Department continues to believe that HCE alternative 1 is inappropriate because leaving the HCE compensation level unchanged at $100,000 per year would ignore more than 10 years of wage growth. In FY2017, approximately 20 percent of full-time salaried workers are projected to earn at least $100,000 annually, more than three times the share who earned that amount in the 2004 Final Rule analysis. HCE alternative 2 uses the CPI–U to inflate the value set in 2004 instead of using the higher wage growth over that time period, and therefore the Department does not believe this alternative accurately reflects wage growth since 2004. Finally, HCE alternative 3 would set the annual compensation level at $149,894. The Department believes this compensation level would be too high to provide a meaningful alternative test for exemption. Thus, the Department concludes that adjusting the HCE total annual compensation to reflect the 90th percentile of earnings of full-time salaried workers nationwide ($134,004) strikes the appropriate balance.

D. Impacts of Revised Salary and Compensation Level Test Values

i. Overview and Summary of Quantified Impacts

The impacts of increasing the EAP salary and compensation levels will depend on how employers respond. Employer response is expected to vary by the characteristics of the affected EAP workers. For workers who usually work 40 hours a week or less, the Department assumes that employers will reclassify these affected EAP workers as overtime-eligible and will pay them the same weekly earnings for the same number of hours worked. While these employees will become overtime eligible, employers can continue to pay their current salaries and will not need to make any adjustments as long as the employees' hours do not exceed 40 hours in a workweek. For affected EAP employees who work overtime, employers may: (1) Pay the required overtime premium for the current number of overtime hours based upon the current implicit regular rate of pay; (2) reduce or eliminate overtime hours; (3) reduce the regular rate of pay so total weekly earnings and hours do not change after overtime is paid; (4) increase employees' salaries to the new salary level; or (5) use some combination of these responses. Transfers from employers to employees and between employees, direct employer costs, and DWL depend on how employers respond to the Final Rule.

In order to increase the sample size and the reliability and granularity of results in this analysis, the Department used three years (FY2013–FY2015) of CPS MORG data to represent the FY2015 labor market. Monetary values in FY2013 and FY2014 were inflated to FY2015 dollars and the sample was reweighted to reflect the population of potentially affected workers in FY2015. Afterwards, this pooled sample was adjusted to reflect the FY2017 economy by further inflating wages and sampling weights to match projections for FY2017. *See* section VI.B.ii.

Table 12 presents the projected impact on affected workers, costs, transfers, and DWL associated with increasing the standard EAP salary level from $455 per week to the 40th earnings percentile of full-time salaried workers in the South, $913 per week; increasing the HCE compensation level from $100,000 to the 90th earnings percentile of full-time salaried workers nationally, $134,004 annually; and updating both of these levels triennially. The Department estimated that the direct employer costs of this Final Rule will total $677.9 million in the first year, with average annualized direct costs of $295.1 million per year over 10 years. In addition to these direct costs, this Final Rule will also transfer income from employers to employees. Year 1 transfers will equal $1,285.2 million, with average annualized transfers estimated at $1,189.1 million per year over 10 years. Finally, the 10-year average annualized DWL was estimated to be $9.2 million. Potential employer costs due to reduced profits and additional hiring were not quantified but are discussed in section VI.D.iii. Benefits were also not quantified but are discussed in section VI.D.vii.

TABLE 12—SUMMARY OF AFFECTED WORKERS AND REGULATORY COSTS AND TRANSFERS, STANDARD AND HCE SALARY LEVELS

Impact[a]	Year 1	Future years[b]		Average annualized value	
		Year 2	Year 10	3% real rate	7% real rate
Affected Workers (1000s)					
Standard	4,163	3,893	5,045	....	....
HCE	65	73	217	....	....
Total	4,228	3,965	5,261	....	....
Direct Employer Costs (Millions FY2017$)					
Regulatory familiarization[c]	$272.5	$0.0	$23.1	$37.6	$42.4
Adjustment[d]	191.4	1.5	5.9	25.4	29.0

TABLE 12—SUMMARY OF AFFECTED WORKERS AND REGULATORY COSTS AND TRANSFERS, STANDARD AND HCE SALARY LEVELS—Continued

Impact[a]	Year 1	Future years[b]		Average annualized value	
		Year 2	Year 10	3% real rate	7% real rate
Managerial	214.0	206.6	255.1	225.0	223.6
Total direct costs[e]	677.9	208.0	284.2	288.0	295.1
Transfers from Employers to Workers (Millions FY2017)[f]					
Due to minimum wage	$34.3	$28.5	$17.8	$23.2	$23.8
Due to overtime pay	1,250.8	907.9	1,589.4	1,178.5	1,165.3
Total transfers[e]	1,285.2	936.5	1,607.2	1,201.6	1,189.1
DWL (Millions FY2017)[g]					
DWL	6.4	8.7	11.1	9.3	9.2

[a] Additional costs and benefits of the rule that could not be quantified or monetized are discussed in the text.

[b] These costs/transfers represent a range over the nine-year span.

[c] Regulatory familiarization costs occur only in years when the salary levels are updated (Years 1, 4, 7, and 10).

[d] Adjustment costs occur in all years when there are newly affected workers, including years when the salary level is not updated. Adjustment costs may occur in years without updated salary levels because some workers' projected earnings are estimated using negative earnings growth.

[e] Components may not add to total due to rounding.

[f] This is the net transfer that we primarily describe as being from employers to workers. There may also be transfers between workers. Moreover, some of these transfers may be intrapersonal (for instance, higher earnings may be offset by increased hours worked for employees who remain overtime-exempt or may be supplemented by reduced hours for some newly overtime-protected employees).

[g] DWL was estimated based on the aggregate impact of both the minimum wage and overtime pay provisions. Since the transfer associated with the minimum wage is negligible compared to the transfer associated with overtime pay, the vast majority of this cost is attributed to the overtime pay provision.

ii. Affected EAP Workers

1. Overview

Costs, transfer payments, DWL, and benefits of this Final Rule depend on the number of affected EAP workers and labor market adjustments made by employers. The Department estimated there were 22.5 million potentially affected EAP workers: that is, EAP workers who either (1) passed the salary basis test, the standard salary level test, and the standard duties test, or (2) passed the salary basis test, passed the standard salary level test, the HCE total compensation level test, and the HCE duties test. This number excludes workers in named occupations who are not subject to the salary tests or who qualify for another (non-EAP) exemption.

The Department estimated that increasing the standard salary level from $455 per week to the 40th earnings percentile of all full-time salaried workers in the lowest-wage Census Region (South, $913 per week) would affect 4.2 million workers (*i.e.*, the number of potentially affected workers who earn at least $455 per week but less than $913 per week). These affected workers compose 18.5 percent of potentially affected EAP workers. The Department also estimated that 65,000 workers would be affected by an increase in the HCE compensation level from $100,000 to the annual earnings equivalent of the 90th percentile of full-time workers nationally (the number of potentially affected workers who earn at least $100,000 but less than $134,004 annually and pass the minimal duties test but not the standard duties test, about 0.3 percent of the pool of potentially affected EAP workers). By Year 10 the total number of affected workers is predicted to increase to 5.3 million.

Figure 4: Number of Affected Workers

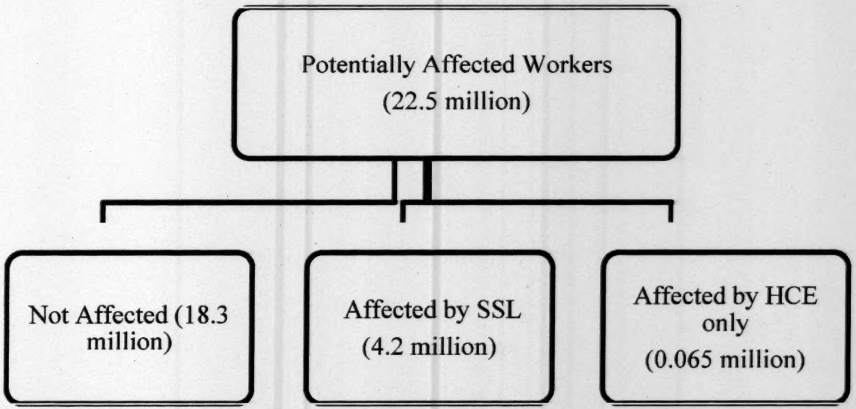

Table 13 presents the number of affected EAP workers, the mean number of overtime hours they work per week, and their average weekly earnings. The 4.2 million workers affected by the increase in the standard salary level average 1.4 hours of overtime per week and earn an average of $734 per week. The average number of overtime hours is low because most of these workers (3.3 million) do not usually work overtime.[150] However, the estimated 825,000 affected workers who regularly work overtime average 11.1 hours of overtime per week. The 65,000 EAP workers affected by the change in the HCE annual compensation level average 5.5 hours of overtime per week and earn an average of $2,181 per week ($113,389 per year).

Although most affected EAP workers who typically do not work overtime might experience little or no change in their daily work routine, those who regularly work overtime may experience significant changes. The Department expects that workers who routinely work some overtime or who earn less than the minimum wage are most likely to be tangibly impacted by the revised standard salary level.[151] Employers might respond by: Reclassifying such employees to nonexempt status (either paying at least the hourly minimum wage and a premium for any overtime hours, or its salary equivalent with half-time paid for any overtime hours); reducing workers' regular wage rates (provided that the reduced rates still exceed the minimum wage); increasing the employees' salary to the salary level; reducing or eliminating overtime hours; or using some combination of these responses.

TABLE 13—NUMBER OF AFFECTED EAP WORKERS, MEAN OVERTIME HOURS, AND MEAN WEEKLY EARNINGS, FY2017

Type of affected EAP worker	Affected EAP workers [a]		Mean overtime hours	Mean usual weekly earnings
	Number (1,000s)	% of total		
Standard Salary Level				
All affected EAP workers	4,163	100	1.4	$734
Earn less than the minimum wage [b]	11	0.3	29.3	551
Regularly work overtime	825	19.8	11.1	744
CPS occasionally work overtime [c]	150	3.6	8.5	727
HCE Compensation Level				
All affected EAP workers	65	100	5.5	$2,181
Earn less than the minimum wage [b]				
Regularly work overtime	30	45.8	12.3	2,153
CPS occasionally work overtime [c]	3	4.2	8.5	2,309

Note: Pooled data for FY2013–FY2015 projected to reflect FY2017.

[a] Estimated number of workers exempt under the EAP exemptions who would be entitled to overtime protection under the updated salary levels (if their weekly earnings do not increase to the new salary levels).

[b] The applicable minimum wage is the higher of the federal minimum wage and the state minimum wage. HCE workers will not be impacted by the minimum wage provision. These workers all regularly work overtime and are also included in that row.

[c] Workers who do not usually work overtime but did in the CPS reference week. Mean overtime hours are actual overtime hours in the reference week. Other workers may occasionally work overtime in other weeks. These workers are identified later when we define Type 2 workers.

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[150] That is, workers who report they usually work 40 hours or less per week (identified with variable PEHRUSL1 in CPS MORG).

[151] A small proportion (0.3 percent) of affected EAP workers earns implicit hourly wages that are less than the applicable minimum wage (the higher of the state or federal minimum wage). The implicit hourly wage is calculated as an affected EAP employee's total weekly earnings divided by total weekly hours worked. For example, workers earning the current $455 per week standard salary level would earn less than the federal minimum wage if they work 63 or more hours in a week ($455/63 hours = $7.22 per hour).

The Department considered two types of overtime workers in this analysis: regular overtime workers and occasional overtime workers.[152] Regular overtime workers typically worked more than 40 hours per week. Occasional overtime workers typically worked 40 hours or less per week, but they worked more than 40 hours in the week they were surveyed. The Department considers these two populations separately in the analysis because labor market responses to overtime pay requirements may differ for these two types of workers.

In a representative week, an estimated 152,000 occasional overtime workers will be affected by either the standard salary level or the HCE total annual compensation level increase (3.6 percent of all affected EAP workers; this number does not match Table 13 due to rounding). They averaged 8.5 hours of overtime in weeks when they work at least some overtime. This group represents the number of workers with occasional overtime hours in the week the CPS MORG survey was conducted. In other weeks, these specific individuals may not work overtime but other workers, who did not work overtime in the survey week, may work overtime. Because the survey week is a representative week, the Department believes the prevalence of occasional overtime in the survey week, and the characteristics of these workers, is representative of other weeks (even though a different group of workers would be identified as occasional overtime workers in a different week).[153]

2. Characteristics of Affected EAP Workers

In this section the Department examines the characteristics of affected EAP workers. Table 14 presents the distribution of affected workers across industries and occupations. The industry with the most affected EAP workers was education and health services (956,000 affected workers). Other industries where a large number of workers are expected to be affected are professional and business services (704,000), financial activities (571,000), and wholesale and retail trade (562,000). The industries with the largest share of potentially affected workers who are affected are "other services" (30 percent) and leisure and hospitality (30 percent). Impacts by industry are considered in section VI.D.v.

The management, business, and financial occupation category accounted for the most affected EAP workers by occupation (1.8 million). A large number of workers are expected to be affected in the professional and related occupations category (1.4 million). The occupations with the largest share of potentially affected workers who are expected to be affected are farming, fishing, and forestry (63 percent),[154] office and administrative support (39 percent), and services (37 percent).

Some commenters expressed concern about the impacts of the rule on non-profits organizations. The Department found that workers in non-profits are somewhat more likely to be affected by the rulemaking; 25 percent of potentially affected workers in private non-profits are affected compared to 18 percent in private for-profit firms.

TABLE 14—ESTIMATED NUMBER OF EXEMPT WORKERS WITH THE CURRENT AND UPDATED SALARY LEVELS, BY INDUSTRY AND OCCUPATION, FY2017

Industry/occupation/non-profit	Workers subject to FLSA (millions)	Potentially affected EAP workers (millions) [a]	Not-affected (millions) [b]	Affected (millions) [c]	Affected as share of potentially affected (percent)
Total	132.75	22.51	18.29	4.23	19
By Industry					
Agriculture, forestry, fishing, & hunting	1.12	0.03	0.03	0.01	16
Mining	1.04	0.23	0.21	0.02	10
Construction	7.41	0.80	0.67	0.13	16
Manufacturing	14.82	3.26	2.89	0.36	11
Wholesale & retail trade	19.03	2.46	1.90	0.56	23
Transportation & utilities	6.95	0.79	0.65	0.13	17
Information	2.86	0.95	0.78	0.17	18
Financial activities	9.21	3.43	2.86	0.57	17
Professional & business services	14.22	4.64	3.94	0.70	15
Education & health services	32.95	3.73	2.77	0.96	26
Leisure & hospitality	12.58	0.78	0.54	0.23	30
Other services	5.36	0.58	0.40	0.18	30
Public administration	5.19	0.85	0.65	0.20	24
By Occupation					
Management, business, & financial	19.18	11.36	9.52	1.84	16
Professional & related	30.30	7.66	6.31	1.35	18
Services	23.61	0.20	0.13	0.08	37
Sales and related	13.72	2.16	1.60	0.56	26
Office & administrative support	17.82	0.94	0.57	0.37	39
Farming, fishing, & forestry	0.84	0.00	0.00	0.00	63
Construction & extraction	6.16	0.03	0.02	0.01	21

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[152] Regular overtime workers were identified in the CPS MORG with variable PEHRUSL1. Occasional overtime workers were identified with variables PEHRUSL1 and PEHRACT1. As described in section VI.D.iv., some workers who are not observed working overtime in the reference week are assumed to be occasional overtime workers. This analysis therefore accounts for workers who work overtime at some point in the year, although they did not work overtime in the reference week.

[153] The Department cannot identify which of the workers in the CPS sample work occasional overtime in a week other than the reference week.

[154] There are only 33,000 potentially affected workers in the farming, fishing, and forestry industry. Although a large share of potentially affected workers may be affected in this industry, many of these workers are exempt under another non-EAP exemption, and therefore their entitlement to overtime will not change.

TABLE 14—ESTIMATED NUMBER OF EXEMPT WORKERS WITH THE CURRENT AND UPDATED SALARY LEVELS, BY INDUSTRY AND OCCUPATION, FY2017—Continued

Industry/occupation/non-profit	Workers subject to FLSA (millions)	Potentially affected EAP workers (millions) [a]	Not-affected (millions) [b]	Affected (millions) [c]	Affected as share of potentially affected (percent)
Installation, maintenance, & repair	4.63	0.04	0.03	0.01	15
Production	8.31	0.08	0.07	0.01	17
Transportation & material moving	8.20	0.03	0.02	0.01	24
By Non-Profit and Government Status					
Non-profit, private [d]	9.12	1.81	1.35	0.46	25
For profit, private	105.08	18.80	15.49	3.31	18
Government (state, local, and federal)	18.55	1.91	1.45	0.46	24

Note: Pooled data for FY2013–FY2015 projected to reflect FY2017.

[a] Workers who are white collar, salaried, not eligible for another (non-EAP) overtime exemption, and not in a named occupation.

[b] Workers who continue to be exempt after the increases in the salary levels (assuming affected workers' weekly earnings do not increase to the new salary level).

[c] Estimated number of workers exempt under the EAP exemptions who would be entitled to overtime protection under the updated salary levels (if their weekly earnings do not increase to the new salary levels).

[d] As discussed in section VI.B.iii, estimates of workers subject to the FLSA do not exclude workers employed by enterprises that do not meet the enterprise coverage requirements because there is no reliable way of estimating this population. The estimates also do not exclude workers at non-covered enterprises who are not individually covered (because the estimates assume all workers are employed by covered entities). Although not excluding workers who work for non-covered enterprises would only impact a small percentage of workers generally, it may have a larger impact (and result in a larger overestimate) for workers in non-profits because when determining enterprise coverage only revenue derived from business operations, not charitable activities, are included.

Table 15 presents the distribution of affected workers based on Census Regions and divisions, and MSA status. The region with the most affected workers is the South (1.7 million). However, as a share of potentially affected workers in the region, the South is not unduly affected relative to other regions (22 percent are affected compared with 16 to 19 percent in other regions). Impacts by region are considered in section VI.D.v. Although the vast majority of affected EAP workers resided in MSAs (3.8 of 4.2 million, or 89 percent), this largely reflects the fact that 86.7 percent of all workers reside in metropolitan areas.[155]

Employers in low-wage industries, regions, and non-metropolitan areas may perceive a greater impact due to the lower wages and salaries typically paid in those areas and industries. The Department believes the salary level adopted in this Final Rule (which we have adjusted downward from the amount proposed in the NPRM to account for these low-wage areas) is appropriate. In addition, the vast majority of potentially affected workers reside in metropolitan areas and do not work in low-wage industries, and workers in low-wage regions are not unduly affected relative to other regions.

TABLE 15—ESTIMATED NUMBER OF POTENTIALLY AFFECTED EAP WORKERS WITH THE CURRENT AND UPDATED SALARY LEVELS, BY REGION, DIVISION, AND MSA STATUS, FY2017

Region/division/metropolitan status	Workers subject to FLSA (millions)	Potentially affected EAP workers (millions) [a]	Not-affected (millions) [b]	Affected (millions) [c]	Affected as share of potentially affected (percent)
Total	132.75	22.51	18.29	4.23	19
By Region/Division					
Northeast	*24.77*	*4.80*	*4.02*	*0.79*	*16*
New England	6.69	1.36	1.17	0.19	14
Middle Atlantic	18.08	3.44	2.84	0.59	17
Midwest	*29.53*	*4.73*	*3.84*	*0.88*	*19*
East North Central	19.97	3.17	2.58	0.58	18
West North Central	9.56	1.56	1.26	0.30	19
South	*48.21*	*7.84*	*6.10*	*1.74*	*22*
South Atlantic	25.02	4.47	3.51	0.95	21
East South Central	7.23	0.94	0.69	0.25	27
West South Central	15.96	2.44	1.90	0.53	22
West	*30.25*	*5.15*	*4.32*	*0.82*	*16*
Mountain	9.48	1.51	1.22	0.29	19
Pacific	20.76	3.64	3.10	0.53	15

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[155] Identified with CPS MORG variable GTMETSTA.

TABLE 15—ESTIMATED NUMBER OF POTENTIALLY AFFECTED EAP WORKERS WITH THE CURRENT AND UPDATED SALARY LEVELS, BY REGION, DIVISION, AND MSA STATUS, FY2017—Continued

Region/division/metropolitan status	Workers subject to FLSA (millions)	Potentially affected EAP workers (millions) [a]	Not-affected (millions) [b]	Affected (millions) [c]	Affected as share of potentially affected (percent)
By Metropolitan Status					
Metropolitan	114.56	20.82	17.07	3.75	18
Non-metropolitan	17.24	1.59	1.14	0.45	28
Not identified	0.96	0.10	0.08	0.03	25

Note: Pooled data for FY2013–FY2015 projected to reflect FY2017.

[a] Workers who are white collar, salaried, not eligible for another (non-EAP) overtime exemption, and not in a named occupation.

[b] Workers who continue to be exempt after the increases in the salary levels (assuming affected workers' weekly earnings do not increase to the new salary level).

[c] Estimated number of workers exempt under the EAP exemptions who would be entitled to overtime protection under the updated salary levels (if their weekly earnings do not increase to the new salary levels).

iii. Costs

1. Summary

Three direct costs to employers were quantified in this analysis: (1) Regulatory familiarization costs; (2) adjustment costs; and (3) managerial costs. Regulatory familiarization costs are costs to learn about the change in the regulation, occurring primarily in Year 1 and to a lesser extent in future years when the salary and compensation levels are automatically updated (*e.g.,* Years 4, 7, 10). Adjustment costs are costs incurred by firms to determine workers' exemption statuses, notify employees of policy changes, and update payroll systems. Managerial costs occur because employers may spend more time scheduling newly nonexempt employees and more closely monitor their hours to minimize or avoid paying the overtime premium.

The Department estimated costs for Year 1 assuming that the first year of the analysis will be FY2017. The Department estimated that Year 1 regulatory familiarization costs will equal $272.5 million, Year 1 adjustment costs will sum to $191.4 million, and Year 1 managerial costs will total $214.0 million (Table 16). Total direct employer costs in Year 1 are estimated to equal $677.9 million. Regulatory familiarization costs, adjustment costs and management costs are recurring and thus are projected for years 2 through 10 (section VI.D.x.).

Many commenters, including PPWO, NRF, and the National Grocers Association, stated that the NPRM underestimated the costs of complying with the rulemaking. The Assisted Living Federation of America, Associated Builders and Contractors, and the College and University Professional Association for Human Resources (CUPA–HR) stated that 80 to 90 percent of respondents to their member surveys indicated that the Department's costs estimates were understated. Throughout this analysis, the Department addresses comments relating to regulatory familiarization costs, adjustment costs, and managerial costs in turn. We also discuss costs that are not quantified and comments asserting that the regulation will result in additional unquantified costs in section VI.D.iii. Regulatory familiarization costs, adjustment costs and managerial costs associated with automatically updating the standard salary level are discussed in section VI.D.x.

TABLE 16—SUMMARY OF YEAR 1 DIRECT EMPLOYER COSTS

[Millions]

Direct employer costs	Standard salary level	HCE Compensation level	Total
Regulatory familiarization [a]			$272.5
Adjustment	$188.5	$2.9	191.4
Managerial	208.6	5.5	214.0
Total direct costs	397.0	8.4	677.9

[a] Regulatory familiarization costs are assessed jointly for the change in the standard salary level and the HCE compensation level.

2. Regulatory Familiarization Costs

Changing the standard salary and HCE total compensation thresholds will impose direct costs on businesses by requiring them to review the regulation. It is not clear whether regulatory familiarization costs are a function of the number of establishments or the number of firms. The Department believes that generally the headquarters of a firm will conduct the regulatory review for the entire company; however, some firms provide more autonomy to their establishments, and in such cases regulatory familiarization may occur at the establishment level. To be conservative, the Department uses the number of establishments in its cost estimate assuming that regulatory familiarization occurs at a decentralized level.

The Department believes that all establishments will incur some regulatory familiarization costs, even if they do not employ exempt workers, because all establishments will need to confirm whether this Final Rule includes any provisions that may impact their workers. Firms with more affected EAP workers will likely spend more time reviewing the regulation than firms with fewer or no affected EAP workers (since a careful reading of the regulations will probably follow the initial decision that the firm is affected). However, the Department does not know the distribution of affected EAP workers across firms and so an average cost per establishment is used.

In the NPRM, the Department requested that commenters provide data if possible on the costs of regulatory familiarization, and a few commenters provided estimates based on personal judgments or responses by members. While the information provided may reflect the experiences of individual commenters, the information does not provide a basis for the Department to revise its estimate of time required for regulatory familiarization. The Department continues to believe that our estimate of one hour per establishment in the NPRM is a reasonable average that accounts for some businesses requiring more time while other businesses require less time.

To estimate the total regulatory familiarization costs, three pieces of information must be estimated: (1) A wage level for the employees reviewing the rule; (2) the number of hours employees spend reviewing the rule; and (3) the number of establishments employing workers. The Department's analysis assumes that mid-level human resource workers with a median wage of $24.86 per hour will review the Final Rule.[156] Assuming benefits are paid at a rate of 46 percent of the base wage and one hour of time is required for regulatory familiarization, the average cost per establishment is $36.22.[157] The number of establishments with paid employees was 7.52 million.[158] Regulatory familiarization costs in Year 1 were estimated to be $272.5 million ($36.22 per hour × 1 hour × 7.52 million establishments).[159] Regulatory familiarization costs in future years are discussed in section VI.D.x.

Wage Rate

The Department estimated in the NPRM that one hour of regulatory familiarization time costs $34.19 based on the wage for a mid-level human resources worker adjusted to include benefits. We follow the same approach in this RIA; however, due to growth in wages, the wage rate used in the Final Rule is $36.22. The Chamber asserted that time spent on regulatory familiarization will generally be conducted by a manager with a base wage better approximated at $60 per hour, multiplied by a mark-up of 3.3 to cover indirect overhead and support.[160] The National Association of Landscape Professionals (NALP) commented that 92 percent of the members it surveyed believe the wage rate should be "be more like $51.00 to $68.00 per hour." [161] The Department believes that we have utilized an appropriate wage rate; we similarly used wage rates for human resources specialists in the 2004 Final Rule (using a low to high range of such rates, depending upon employer size, rather than a single mid-level wage rate as we do currently). 69 FR 22222–24. Although higher paid managers may be briefed on the rule, we expect in general that mid-level human resource specialists will be the individuals primarily responsible for becoming familiar with the new rule. Moreover, this wage estimate is an average across all firms, some of which will pay higher rates and others lower rates.

Time Requirement

In the NPRM, the Department estimated each establishment will, on average, spend one hour on regulatory familiarization. Firms with more affected EAP workers will likely spend more time reviewing the regulation than firms with fewer or no affected EAP workers. No data were identified from which to estimate in the NPRM the amount of time required to review the regulation, and the Department requested that commenters provide data if possible. The Department did not receive any reliable data from commenters, although some commenters suggested different amounts of time based on their personal judgment or surveys they conducted. The American Hotel and Lodging Association (AH&LA), the National Roofing Contractors Association, NRF and others commented that regulatory familiarization will take longer than one hour, with some stating that several individuals in each of their establishments will need to read and familiarize themselves with the new rule. AH&LA estimated it will take at least four hours per establishment to become familiar with the Final Rule. The Chamber commented that an average of 6 hours of time is appropriate because: "For the very smallest establishments a familiarization time of one to two hours may be possible, but for larger establishments the number of labor hours may amount to hundreds or more."

The Department believes these commenters significantly overestimate the time necessary for regulatory familiarization. The EAP exemptions have been in existence in one form or another since 1938, and were updated as recently as 2004. While the 2004 rulemaking promulgated a host of changes, including revisions to the duties test, the most significant change promulgated in this rulemaking is setting a new standard salary level for exempt workers, and updating that salary level every three years. The Department believes that, on average, one hour is sufficient to time to read about and understand, for example, the change in the standard salary level from $455 to $913 per week, and we note that the regulatory text changes comprise only a few pages.

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[156] We calculated this wage as the projected median wage in the CPS for workers with the Census 2010 occupations "human resources workers" (0630); "compensation, benefits, and job analysis specialists" (0640); and "training and development specialists" (0650) in FY2013–FY2015, projected to FY2017. The Department determined these occupations include most of the workers who would conduct these tasks. Bureau of Labor Statistics, U.S. Department of Labor, Occupational Outlook Handbook, 2014–15 Edition. These are the same occupation classifications used in the NPRM but updated to reflect the Census 2010 occupational classification.

[157] The benefits-earnings ratio is derived from the BLS' Employer Costs for Employee Compensation data using variables CMU1020000000000D and CMU1030000000000D. This fringe benefit rate includes some fixed costs such as health insurance. The Department believes that the overhead costs associated with for this rule are small because existing systems maintained by employers to track currently hourly employees can be used for newly overtime eligible workers. However, acknowledging that there might be additional overhead costs, as a sensitivity analysis of results, we calculate the impact of more significant overhead costs by including an overhead rate of 17 percent. This rate has been used by the Environmental Protection Agency (EPA) in its final rules (see for example, EPA Electronic Reporting under the Toxic Substances Control Act Final Rule, Supporting & Related Material), and is based upon a Chemical Manufacturers Association study. An overhead rate from chemical manufacturing may not be appropriate for all industries, so there may be substantial uncertainty concerning the estimates based on this illustrative example. Using an overhead rate of 17 percent would increase total costs (including regulatory familiarization costs, adjustment costs, and managerial costs) by from $677.9 million in Year 1 to $757.0 million, or 11.7 percent. For the reasons stated above, the Department believes this estimate overestimates the additional costs arising from overhead costs while recognizing that there is not one uniform approach to estimating the marginal cost of labor.

[158] Data for 2012 were the most recent available at the time of writing. Survey of U.S. Businesses 2012. Available at: *https://www.census.gov/econ/susb/*. Also included in the number of establishments incurring regulatory familiarization costs are the 90,106 state and local governments reported in the 2012 Census of Governments: Employment Summary Report. Available at: *http://www2.census.gov/govs/cog/g12_org.pdf*.

[159] As previously noted, the Department chose to use the number of establishments rather than the number of firms to provide a more conservative estimate of the regulatory familiarization cost. Using the number of firms, 5.82 million, would result in a reduced regulatory familiarization cost estimate of $210.7 million in Year 1.

[160] The Chamber also incorrectly stated that the Department used the wage for a "human resources office administrative clerk;" the Department actually used wages for "human resources, training, and labor relations specialists."

[161] NALP believes both time and hourly cost are underestimated. It is not clear whether the amount cited is the hourly wage rate members believe is appropriate or the total cost across more than one hour of time.

Recurrence

The Chamber criticized the Department for failing to estimate regulatory familiarization costs occurring after the first year, commenting that regulatory familiarization costs would repeat with each automatic update to the salary level. Upon further consideration, the Department agrees there will be some regulatory familiarization costs in future years when the salary level is updated (*e.g.,* 2020, 2023, 2026). However, because subsequent updates will use the same method adopted in this Final Rule, and this rule informs stakeholders that the salary and compensation levels will be updated every three years, there is little additional regulatory change with which employers will have to familiarize themselves. Accordingly, the Department has added 5 minutes per establishment of regulatory familiarization time to access and read the published salary levels in future years when the salary and compensation levels are automatically updated (see projected costs in section VI.D.x.).

3. Adjustment Costs

Changes in the standard salary and HCE compensation levels will impose direct costs on firms by requiring them to re-determine the exemption status of employees, update and adapt overtime policies, notify employees of policy changes, and adjust their payroll systems. The Department believes the size of these costs will depend on the number of affected EAP workers and will occur in any year when exemption status is changed for any workers. To estimate adjustment costs three pieces of information must be estimated: (1) A wage level for the employees making the adjustments; (2) the amount of time spent making the adjustments; and (3) the estimated number of newly affected EAP workers. The Department again estimated that the average wage with benefits for human resources, training, and labor relations specialists is $36.22 per hour (as explained above). No applicable data were identified from which to estimate the amount of time required to make these adjustments.[162] However, in response to comments claiming that the Department underestimated the adjustment time, for this Final Rule, the Department increased the time from one hour to 75 minutes per affected worker. The estimated number of affected EAP workers in Year 1 is 4.2 million (as discussed in section VI.D.ii.). Therefore, total Year 1 adjustment costs were estimated to equal $191.4 million ($36.22 × 1.25 hours × 4.2 million workers).

Adjustment costs may be partially offset by a reduction in the cost to employers of determining employees' exempt status. Currently, to determine whether an employee is exempt firms must apply the duties test to salaried workers who earn at least $455 per week. Following this rulemaking, firms will no longer be required to apply the potentially time-consuming duties test to employees earning less than the updated salary level. This will be a clear cost savings to employers for employees who do not pass the duties test and earn at least $455 per week but less than the updated salary level. The Department did not estimate the potential size of this cost savings.

Wage Rate

The Chamber commented that a more appropriate wage rate would be $200 per hour, based on a manager's wage of around $60 per hour, multiplied by a mark-up (or loaded) rate of 3.3 to cover indirect overhead and support. The Department believes its use of the occupation of "human resources, training, and labor relations specialists" and corresponding wage rate appropriately reflects the occupational classification and wage rate on average for the individuals who will re-determine the exemption status of employees, update and adapt overtime policies, notify employees of policy changes, and adjust their payroll systems. The Department recognizes that in some businesses, more senior staff will conduct at least portions of this work, while in other businesses, more junior staff may perform at least a portion of this work. Therefore, the Department continues to rely on its use of the "human resources, training, and labor relations specialists" and corresponding wage rate to reflect the average costs to businesses impacted by this Final Rule. The Department also disagrees with the mark-up rate suggested by the Chamber, because an additional 75 minutes of time will have little-to-no effect on the cost of overhead and support services. No other commenters provided alternative wage rates.

Time Requirement

To estimate adjustment costs, the Department assumed in the NPRM that each establishment will, on average, spend one hour of time per affected worker to make adjustments required because of this rulemaking. 80 FR 38566. The Department requested that commenters provide any applicable data concerning this issue, but no applicable data were identified from which to estimate the amount of time required to make these adjustments. The Department believes that commenters that did address adjustment costs significantly overestimated the time necessary for making appropriate workplace adjustments. However, the Department agrees that some increase is warranted, and thus increased the estimated average adjustment time to 75 minutes per affected worker.

Based on feedback from their members, AH&LA and Island Hospitality Management estimated that employers will need approximately four to seven hours per affected employee. The National Council of Chain Restaurants (NCCR) stated that "[e]mployers have told NCCR that the approximate time needed to make such adjustments will be 3–4 hours per employee," and NRF reported that its members "estimate it would take at least three to four hours per affected employee to make applicable adjustments." The American Insurance Association and the Property Casualty Insurers Association of America (AIA–PCI) asserted that adjustments will require more time than the Department estimated because employers will not make adjustments in response to the rule "in a vacuum; legal, HR, and operations all will need to be involved to assess risk, determine value, and ultimately decide whether a position, or classification, or part of a classification should be reclassified to non-exempt as a result of the Department's salary level increase." New Castle Hotels & Resorts similarly stated that a "hotel's GM and HR as well as the Department Head and the effected manager would all need to be involved together with payroll." AIA–PCI also asserted that in many cases, information technology systems "cannot be configured to accommodate exempt and non-exempt employees in the same job classification," and thus additional time will be required to reconfigure these systems.

A report by Oxford Economics, submitted by NRF and referenced by other commenters, estimated the "transitional costs" associated with this rule.[163] The tasks covered by Oxford

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[162] Costs stated in the 2004 Final Rule were considered, but because that revision included changes to the duties test, the cost estimates are not directly applicable; in addition, the 2004 Final Rule did not separately account for managerial costs.

[163] Oxford Economics. (2015). Rethinking Overtime: How Increasing Overtime Exemption Thresholds Will Affect The Retail And Restaurant Industries. Two additional documents produced by Oxford Economics were also included by some commenters: Letter dated July 17, 2015 that updates the estimates provided in the "Rethinking

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Economics' transition cost measure include: "identifying which employees ought to have salaries adjusted and then making and communicating that adjustment"; "converting a salaried employee to an hourly rate and then adding that employee to the time tracking system (already in use for existing hourly employees)"; disruptions to normal business operations; time for "HR personnel [to] communicate and implement the change"; time for additional IT support for time-tracking system; costs associated with the added complexity of managing and scheduling people's time; and costs associated with "establishing an hourly rate (lower than existing base salary) that is calculated so that overall compensation (including new overtime payments) will leave current total compensation unchanged." These costs appear to be roughly comparable to the Department's adjustment cost category, although with some inclusion of costs the Department categorized as managerial costs. However, Oxford Economics also included costs associated with converting newly nonexempt workers from salaried to hourly status, which the Department recognizes is a choice some employers may make in responding to this rule, but is not a requirement of the regulation. Oxford Economics estimated Year 1 transactional costs of $648 million in the retail and restaurant industry if the salary level were set at $808 per week, and $874 million if the salary level were set at $984 per week. These costs for the retail and restaurant industry alone are roughly 4 to 5.5 times larger than our NPRM estimate for all industries ($160.1 million based on a $921 salary level in Year 1). The Department has evaluated Oxford Economics' analysis and determined that this discrepancy is due in part to Oxford Economics' estimation of the time requirement for adjustment.[164]

Oxford Economics assumed that adjustment costs for Type 1 workers (those who do not work overtime) are zero, and that each worker who receives a pay increase to the new salary level in order to remain exempt (Oxford Economics' equivalent to Type 4 workers) requires 1/1000th of a human resource employee full time equivalent; this equates to approximately 2.1 hours of time per affected worker (*i.e.,* 2,080 FTE hours/1,000).[165] These per worker cost estimates are comparable to the Department's cost estimates. However, for employees reclassified as nonexempt as a result of the rulemaking, Oxford Economics appears to estimate that transitioning these workers will require 34.7 hours per worker for "group 2" workers and 10.4 hours per worker for "group 3" workers.[166] These workers appear to be very roughly comparable to the Department's Type 2 and 3 workers, but with much more extreme assumptions concerning how employers will respond (*e.g.,* all overtime hours will be eliminated instead of reduced as the Department expects). Oxford Economics defines "group 2" workers as those who "will have their hourly wage rate set in such a way that their total compensation remains unchanged," and "group 3" workers as those who will "see their hours cut to 38 per week, with their salary cut proportionally."

The Department believes Oxford Economics' estimates of the time requirement for adjusting Type 2 and 3 (Oxford Economics' "group 2" and "group 3") workers are too high. It is unreasonable to expect, for example, that it will take a human resource worker 34.7 hours (almost an entire workweek) to reclassify each Type 2 worker as nonexempt, and possibly adjust his or her implicit hourly wage rate so the total compensation remains unchanged. As we stated above, in this Final Rule, the Department estimates an average of 75 minutes of adjustment time per affected worker. However, employers will need to exert minimal effort to determine the change in status of perhaps 60 percent of affected workers (*e.g.,* the majority of affected workers who work no overtime). Thus, we assume that the average of 75 minutes per worker is concentrated on the subset of employees requiring more analysis to make a decision. If, for example, we allocate 0.5 hours per Type 1 worker and 50 percent of Type 2 workers (*i.e.,* workers whose hours and base wage rates do not change), then that still leaves 3.0 hours per worker for the remaining 50 percent of Type 2 workers, and all Type 3 and Type 4 workers. Finally, larger firms are likely to experience economies of scale in evaluating affected workers; a decision on how to treat a worker with specific characteristics (*e.g.,* earnings, hours, duties) is likely to be applicable to multiple workers.

With respect to the concern raised by AIA–PCI about reconfiguring information technology systems to include both exempt and overtime-protected workers, the Department notes that most organizations affected by the rule already employ overtime-eligible workers and have in place payroll systems and personnel practices (*e.g.,* requiring advance authorization for overtime hours) so that additional costs associated with the rule should be relatively small in the short run.[167]

Recurrence

The Chamber also expressed concern the Department underestimated projected adjustment costs associated with automatic updating, stating that employers would incur significant adjustment costs in years the salary is automatically updated, even if subsequent salary level changes affect fewer workers than the initial increase (to $913). Similarly, PPWO stated that the Department's cost projections did not account for the fact that "compliance review activities that take place in Year 1 will be repeated on an annual basis, for different groups of employees that fall below the new salary minimum." *See also* North Dakota Bankers Association (the Department should recognize that future salary updates require time to determine whether an employee should be classified as exempt or nonexempt, not just time to reprogram the payroll). Contrary to these comments, the Department's estimated adjustment costs include costs in all years for newly affected workers. The Department limits adjustment costs in projected years to newly affected workers because there is

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Overtime" paper in light of the Department's proposal; and a letter dated August 18, 2015 that examines states' prevailing wage levels and the Department's automatic updating proposal.

[164] Although Oxford Economics' Table A2 reports some values they used to calculate transactional costs, the report NRF submitted to the record does not explain why they chose these values, nor does it describe in detail the source for these values, other than noting that it obtained information from "interviews with industry experts." Therefore, the Department could not easily assess the reasonableness of these estimates. *See https://nrf.com/sites/default/files/Documents/retail%20library/Rethinking-Overtime-Appendices.pdf.*

[165] As detailed in section VI.D.iv., the Department concludes that employers will respond to the Final Rule differently for different categories of workers, depending upon whether they work overtime and the nature of the overtime. The Department has divided workers into four categories, based upon the nature of any overtime work. Type 1 workers do not work overtime; Type 2 workers work occasional overtime (some on a regular basis and some on an unpredictable basis): Type 3 workers regularly work overtime; and Type 4 workers regularly work overtime and will earn sufficient wages after the Final Rule is implemented that employers will increase their salaries to the new level.

[166] Oxford Economics also estimated costs related to changing computer systems. This discussion focuses on Human Resources costs.

[167] The Department notes that no particular form or order of records is required and employers may choose how to record hours worked for overtime-eligible employees. For example where an employee works a fixed schedule that rarely varies, the employer may simply keep a record of the schedule and indicate the number of hours the worker actually worked only when the worker varies from the schedule. This is sometimes referred to as exceptions reporting. 29 CFR 516.2(c).

no need to "adjust" for workers who are already overtime eligible (due to a prior adjustment of the EAP salary level) when the salary level is updated again.

4. Managerial Costs

If employers reclassify employees as overtime eligible due to the changes in the salary levels, then firms may incur ongoing managerial costs associated with this Final Rule because the employer may schedule and more closely monitor an employee's hours to minimize or avoid working overtime-eligible employees more than 40 hours in a week. For example, the manager of a reclassified worker may have to assess whether the marginal benefit of scheduling the worker for more than 40 hours exceeds the marginal cost of paying the overtime premium. Additionally, the manager may have to spend more time monitoring the employee's work and productivity since the marginal cost of employing the worker per hour has increased. Unlike regulatory familiarization and adjustment costs, which occur primarily in Year 1 and to a much lesser extent in years when the salary is automatically updated, managerial costs are incurred more uniformly every year.

Because there was little precedent or data to aid in evaluating these costs, the Department examined several sources to estimate costs. First, prior part 541 rulemakings were reviewed to determine whether managerial costs were estimated. No estimates were found. This cost was not quantified for the 2004 rulemaking. Second, a literature review was conducted in an effort to identify information to help guide the cost estimates; again, no estimates were found. The Department also requested data from the public applicable to this cost estimate; however, as discussed below, the Department received no time estimates that seemed more appropriate than the estimates used in the NPRM.

Based on commenters' concerns, discussed below, that managerial costs are applicable to more workers than were included in the NPRM, the Department expanded the number of workers for whom employers experience additional managerial costs (section VI.D.iv.) As in the NPRM, managerial costs are applied to workers who are reclassified as overtime-protected and who either regularly work overtime or occasionally work overtime but on a regular basis. For the Final Rule, however, the Department expanded its count of the number of workers who occasionally work regular overtime (defined later as half of Type 2 workers) by assuming that some Type 1 workers (who report that they do not work overtime) will actually work overtime during some week of the year. Therefore, the number of workers for whom we apply managerial costs increased from 808,000 using the NPRM methodology to 1.2 million using the Final Rule methodology.

To provide a sense of the potential magnitude of these costs, the Department estimated these costs assuming that management spends an additional five minutes per week scheduling and monitoring each affected worker expected to be reclassified as overtime eligible as a result of this rule, and whose hours are adjusted (1.2 million affected EAP workers as calculated in section VI.D.iv.). As will be discussed in detail below, most affected workers do not currently work overtime, and there is no reason to expect their hours worked to change when their status changes from exempt to nonexempt. Similarly, employers are likely to find that it is less costly to give some workers a raise in order to maintain their exempt status. For both these groups of workers, management will have little or no need to increase their monitoring of hours worked. Under these assumptions, the additional managerial hours worked per week were estimated to be 97,300 hours ((5 minutes/60 minutes) × 1.2 million workers).

The median hourly wage in FY2017 for a manager is estimated to be $29.04 and benefits are estimated to be paid at a rate of 46 percent of the base wage, which totals $42.31 per hour.[168] [169] Multiplying the additional 97,300 weekly managerial hours by the hourly wage of $42.31 and 52 weeks per year, the Year 1 managerial costs were estimated to total $208.6 million due to this rule. Although the exact magnitude would vary with the number of affected EAP workers each year, managerial costs would be incurred annually.

Additional Investment

Some commenters, such as the National Grocers Association and the National Association of Area Agencies on Aging asserted that managerial costs will be higher than the Department estimated because some employers may need to purchase new systems or hire additional personnel to monitor hours. However, the Department believes that most companies already manage a mix of exempt and nonexempt employees, and already have policies and recordkeeping systems in place for nonexempt employees. Thus, they are unlikely to need to purchase systems or hire additional monitoring personnel as a result of this rulemaking. Moreover, no particular form or order of records is required and employers may choose whatever form of recordkeeping works best for their business and their employees. For example, where an employee works a fixed schedule that rarely varies, the employer may simply keep a record of the schedule and indicate the number of hours the worker actually worked only when the worker varies from the schedule ("exceptions reporting"). 29 CFR 516.2(c). Because simple recordkeeping systems, such as exceptions reporting systems for workers on a fixed schedule, are permissible, costs may be minimal.

Time Requirement

Several commenters asserted that scheduling and monitoring newly overtime eligible workers will require more time than the Department assumes. One human resource manager commented that the time required will "be closer to 15 minutes than 5," and AH&LA stated that its members believe these costs "will be closer to 25 minutes to an hour a week." NCCR stated that it received feedback from employers in the restaurant industry who estimated that managerial costs will range from one to three hours per week. NRF similarly states that its members estimated that managerial costs would range from one to three hours per week.

The Department believes these commenters' estimates are excessive. For example, 75 percent of currently exempt employees who work overtime average less than 10 hours of overtime per week. Assuming a newly nonexempt employee averages 10 hours of overtime per week, then based on NCCR's estimate, a manager would spend from 6 minutes to 18 minutes monitoring for each hour of overtime worked by that employee. The Department believes this estimate is unrealistically high. We also note that commenters did not submit any data supporting their 15 minute and 25 minute estimates. Furthermore, we recognize that employers routinely apply efficiencies in their operations, and see no reason why they will not do so with regard to scheduling as well.

Wage Rate

The Chamber recommended that the Department use the mean wage rather than the median to calculate hourly managerial costs, and also asserted that the wage should include all loaded overhead cost. However, the mean and median wages for managers are very similar in the CPS data ($32.71 versus $29.04, respectively), so using the mean wage will not result in substantially different estimated costs. Furthermore, if the distribution of wages is skewed (as demonstrated here by a mean wage larger than the median wage), the median value is more representative of the wage most firms will pay. The Department does not believe it is appropriate to use all overhead costs in estimating a marginal cost increase because the relevant cost is the marginal value of the cost of labor, which is much smaller than the loaded overhead cost. Most overhead costs are largely fixed and unaffected if an employee works an incremental hour. For example, accounting and administrative staff are unlikely to work more time; building rent, heat and electricity are unlikely to change if a supervisor or human resource staff person works an incremental hour. However, acknowledging that there might be some overhead costs, we include a sensitivity analysis providing an upper bound cost estimate.[170]

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[168] Calculated as the projected median wage in the CPS for workers in management occupations (excluding chief executives) in FY2013–FY2015, projected to FY2017.

[169] The adjustment ratio is derived from the BLS' Employer Costs for Employee Compensation data using variables CMU1020000000000D and CMU1030000000000D.

Number of Affected Workers

The Chamber also asserted that managerial costs should apply to all affected workers whose status changes, not just those who regularly work overtime, because "even those who usually work only 40 hours will require additional management schedule monitoring to ensure that their hours do not go higher." The Department believes that although some companies may closely monitor hours for workers who usually do not work overtime, many companies do not. Many companies simply prohibit overtime without express approval and/or assign workers to a set weekly schedule of hours; in such firms monitoring costs for these newly nonexempt workers who usually do not work overtime should be negligible. Furthermore, without additional information, it is impossible to determine the prevalence of the more strenuous form of managerial oversight described by the Chamber. However, we did increase the number of workers for whom managerial costs are estimated to include more occasional overtime workers, as discussed above.

5. Other Potential Costs

In addition to the costs discussed above, there may be additional costs that have not been quantified. In the NPRM we identified these potential costs to include reduced profits and hiring costs. *See* 80 FR 38578–80. Commenters addressed a variety of other potential costs.

Reduced Scheduling Flexibility

Some commenters, such as the ASAE, Thombert, Inc., Applied Measurement Professionals; and Alaska USA Federal Credit Union, asserted that exempt workers enjoy more scheduling flexibility claiming that their hours generally are not monitored, and thus this rulemaking will impose costs on newly overtime-eligible workers by (for example) limiting their ability to adjust their schedule to meet personal and family obligations. Other commenters suggested that the rulemaking would impose costs on employers because they will lose flexibility to schedule employees. For example, TRANSITIONS for the Developmentally Disabled commented that "[h]aving managers that can work those urgencies and emergencies, then giving them time off later to make up for those extra hours, helps our managers manage the business *without* us paying expensive overtime or having someone *without* managerial skills deal with those situations" (emphasis in comment).

The Final Rule does not necessitate that employers reduce scheduling flexibility. Employers can continue to offer flexible schedules and require workers to monitor their own hours and to follow the employers' timekeeping rules. Additionally, some exempt workers already monitor their hours for billing purposes. For these reasons, and because there is little data or literature on these costs, the Department does not quantify potential costs regarding scheduling flexibility to either employees or employers. Moreover, the limited literature available suggests that if there is a reduction in flexibility for employees, it would not be as large as commenters suggested. A study by Lonnie Golden,[171] referenced by the National Employment Law Project (NELP), found using data from the General Social Survey (GSS) that "[i]n general, salaried workers at the lower (less than $50,000) income levels don't have noticeably greater levels of work flexibility that they would 'lose' if they became more like their hourly counterparts."

Reclassification to Overtime Eligible Status

Some commenters asserted that the rulemaking will negatively affect the morale of employees reclassified as overtime eligible.[172] For example, WorldatWork stated that 79 percent of survey respondents said the proposed rule would have a negative effect on the reclassified employees' morale, as exemption classification is a perceived measure of status desired by employees, and Kimball Midwest similarly commented that "many of the young professionals that we employ would view being reclassified to nonexempt as a demotion and an insult to their professional and social status in the workplace." The Department believes that for most employees their feelings of importance and worth come not from their FLSA exemption status, but from the increased pay, flexibility, fringe benefits, and job responsibilities that traditionally have accompanied exempt status, and that these factors are not incompatible with overtime eligibility.

However, if the worker does prefer to be salaried rather than hourly, then this change may impact the worker. The likelihood of this impact occurring depends on the costs to employers and benefits to employees of being salaried. Research has shown that salaried workers (who are not synonymous with exempt workers, but whose status is correlated with exempt status) are more likely than hourly workers to receive benefits such as paid vacation time and health insurance,[173] are more satisfied with their benefits,[174] and that when employer demand for labor decreases, hourly workers tend to see their hours cut before salaried workers, making earnings for hourly workers less predictable.[175] However, this literature generally does not control for differences between salaried and hourly workers such as education, job title, or earnings; therefore, this correlation is not necessarily attributable to hourly status.

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[170] As a sensitivity analysis of results, we calculate the impact of more significant overhead costs by including an overhead rate of 17 percent. This rate has been used by the EPA in its final rules (see for example, EPA Electronic Reporting under the Toxic Substances Control Act Final Rule, Supporting & Related Material), and is based upon a Chemical Manufacturers Association study. An overhead rate from chemical manufacturing may not be appropriate for all industries, so there may be substantial uncertainty concerning the estimates based on this illustrative example. Using an overhead rate of 17 percent would increase total costs (including regulatory familiarization costs, adjustment costs, and managerial costs) by from $677.9 million in Year 1 to $757.0 million, or 11.7 percent. For the reasons stated above, the Department believes this estimate overestimates the additional costs arising from overhead costs while recognizing that there is not one uniform approach to estimating the marginal cost of labor.

[171] Golden, L. (2014). Flexibility and Overtime Among Hourly and Salaried Workers. Economic Policy Institute.

[172] The Department notes that to the extent that such negative effects are attributable to the employer converting the employee to hourly pay status, employers can avoid this consequence by continuing to pay overtime-eligible employees a salary and pay overtime when the employee works more than 40 hours in the workweek.

[173] Lambert, S. J. (2007). Making a Difference for Hourly Employees. In A. Booth, & A. C. Crouter, *Work-Life Policies that Make a Real Difference for Individuals, Families, and Communities.* Washington, DC: Urban Institute Press.

[174] Balkin, D. B., & Griffeth, R. W. (1993). The Determinants of Employee Benefits Satisfaction. *Journal of Business and Psychology,* 7(3), 323–339.

Some evidence suggests that it is more costly for the employer to employ a salaried worker than an hourly worker. If true, employers may choose to accompany the change in exemption status with a change to the employee's method of pay, from salary to an hourly basis, since there is no longer as great an incentive to classify the worker as salaried.[176]

Jackson Lewis asserted that the Department did not adequately consider other costs associated with reclassifying employees from exempt to nonexempt: "This is not just a mere matter of accounting for potential changes in direct wage costs. Exempt and non-exempt employees function very differently in the workplace. Reclassifying employees imposes costs with respect to re-engineering roles, determining new performance metrics, and devising compensation programs that drive the desired behaviors consistent with an obligation to pay a wage premium after forty hours in a workweek." We believe these considerations are adequately accounted for in the Department's adjustment cost estimate, which we increased by 15 minutes from 60 to 75 minutes for each affected worker.

Earnings Predictability

Some commenters asserted that employers will convert newly nonexempt employees to hourly pay and that these employees will lose the earnings predictability of a guaranteed salary. *See, e.g.,* AH&LA; Island Hospitality Management; NCCR; NRF. These commenters asserted that receipt of a guaranteed minimum salary provides peace of mind to employees. These comments appear to reflect a common misperception among employers that overtime-eligible employees must be paid on an hourly basis. Overtime-eligible employees may continue to be paid a salary, as long as that salary is equivalent to a base wage at least equal to the minimum wage rate for every hour worked, and the employee receives a 50 percent premium on that base wage for any overtime hours each week. §§ 778.113–.114.

Reduced Opportunities for Training and Advancement

Some commenters stated that the rulemaking will reduce training and promotional opportunities. For example, ASAE commented that employers would not permit newly overtime eligible employees to attend conferences and annual meetings. In response to these comments, the Department notes that if an employer believes that training opportunities are sufficiently important, it can ensure employees attend the trainings during their 40-hour workweek, or pay the overtime premium where training attendance causes the employee to work over 40 hours in a workweek. Given this, and because there is no data and literature to quantify any potential costs to workers, we decline to do so in this analysis.

Reduced Productivity

Some commenters expressed concern that the automatic updating provisions of the rule may reduce productivity. For example, the Michael Best & Friedrich law firm commented that many employees will "assume they could perform at the same level, or do the bare minimum, and still receive an automatic pay increase," and this "unmotivated workforce will lead to lesser productivity." This rulemaking does not require any employer to provide an automatic pay raise when the standard salary level increases. As always, employers have the ability to determine which employees deserve raises, and the size of that raise, and to decide how to handle employees whose work is unsatisfactory. Additionally, the Final Rule has been modified so that updating will occur every three years, not annually, which should lessen commenters' concerns on this issue. Furthermore, as discussed in section VI.D.vii., the Department believes that in some instances employers may in fact experience increased worker productivity due to factors including efficiency wages, improved worker health, and a reduction in turnover.

Quality of Services

Some commenters expressed concern that the rulemaking, by restricting work hours, will negatively impact the quality of public services provided by local governments, *see, e.g.,* City of Galax; disability services providers, *see, e.g.,* American Network of Community Options and Resources (ANCOR); health care providers, *see, e.g.,* Lutheran Services in America; education providers, *see, e.g.,* La Salle Catholic College Preparatory, and others. The Indian River Schools commented that the "only way a school system can adjust for this change is to reduce services to students, given that our industry operates with low-overhead."

The Department believes the impact of the rule on public services will be small. The Department acknowledges that some employees who work overtime providing public services may see a reduction in hours as an effect of the rulemaking. However, if the services are in demand the Department believes additional workers may be hired, as funding availability allows, to make up some of these hours, and productivity increases, as discussed in section VI.D.vii., may offset some reduction in services. Furthermore, the Department notes that school systems would largely be unaffected by the rulemaking: Teachers and academic administrative personnel are "named occupations" and thus do not have to pass the salary level test to remain exempt. In addition, the Department expects many employers will adjust base wages downward to some degree so that even after paying the overtime premium, overall pay and hours of work for many employees will be relatively minimally impacted, as indicated in the comments of many employers.

Increased Prices

Some commenters expressed concern that increased labor costs will be passed along to consumers in the form of higher prices. *See, e.g.,* National Association of Home Builders (NAHB) (stating that of the 33 percent of members surveyed who predicted some change, 44 percent indicated that the proposal "would result in higher home prices for consumers"); SnowSports Industries of America. NRF stated that many of its members noted that raising prices would result in a loss of sales.

The Department does anticipate that, in some cases, part of the additional labor costs may be offset by higher prices of goods and services. However, because costs and transfers are on average small relative to payroll and revenues, the Department does not expect this rulemaking to have a significant effect on prices. The Department projects that, on average, costs and transfers make up less than 0.03 percent of payroll and less than 0.01 percent of revenues, although for specific industries and firms this percentage may be larger. Therefore, the Department expects that any potential change in prices will be modest. Further, any significant price increases, would generally not represent a separate category of impacts relative to those estimated in the RIA; rather, price increases (where they occur) are the channel through which consumers, rather than employers or employees, bear rule-induced costs (including transfers).[177]

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[175] Lambert, S. J., & Henly, J. R. (2009). *Scheduling in Hourly Jobs: Promising Practices for the Twenty-First Century Economy.* The Mobility Agenda. Lambert, S. J. (2007). Making a Difference for Hourly Employees. In A. Booth, & A. C. Crouter, *Work-Life Policies that Make a Real Difference for Individuals, Families, and Communities.* Washington, DC: Urban Institute Press.

[176] There is not requirement that overtime eligible employees be paid on an hourly basis. Paying such employees a salary is appropriate so long as the employee receives overtime pay for working more than 40 hours in the workweek. *See* §§ 778.113–.114.

Foreign Competition

Some commenters expressed concern that the rulemaking will hurt the United States' ability to compete in the international market. *See, e.g,* Jackson Lewis; NACCO Industries; National Association of Manufacturers; National Association of Wholesale Distributors; Precision Machined Products Association. The Department does not believe this is a serious concern due to the small ratio of employer costs and transfers to revenues.

Substitution of Capital

Some commenters, such as the National Parking Association and the National Beer Wholesalers Association, asserted that, by increasing the marginal cost of labor, the rule will lead companies to automate their business operations and substitute capital for labor. The Department believes that it is unlikely that employees performing jobs that can be easily automated will satisfy the duties test, and that any such effect would be negligible due to the small ratio of employer costs and transfer payments to operating revenue.

Wage Compression and Spillover Effects

Several commenters stated that employers may increase the wages of workers currently paid just above the new threshold to maintain a distribution of wages, and some asserted that the Department failed to account for this effort to avoid salary compression in our economic analysis. *See, e.g.,* Cornerstone Credit Union League; First Premier Bank; HMR Acquisition Company; International Franchise Association; PPWO; Seyfarth Shaw law firm; Tulsa Regional Chamber. The Department did not consider salary compression in the NPRM because data are not available to estimate this effect. For the same reason, we decline to consider this cost in the analysis accompanying this Final Rule.

Substitution of Part-Time Jobs in Place of Full-Time Jobs

Some commenters stated that firms will reduce the number of full-time positions and replace them with part-time positions to limit overtime payments. *See, e.g.,* Associated General Contractors of America (AGC); National Newspaper Association; SnowSports Industries of America. These commenters assume that rather than cutting the hours of a worker who works 60 hours per week to 40 hours and hiring a part-time employee to work the remaining 20 hours (which would potentially reduce unemployment), employers will create part-time positions at the expense of full-time employment.

As an initial matter, an employer will have an incentive to make these adjustments only if the cost of paying overtime is greater than the costs associated with hiring another worker. Further, although the Department acknowledges the possibility that firms may reduce the number of full-time positions and replace them with part-time positions, on net the Department believes the benefits of additional jobs (*i.e.,* external margins) will outweigh any detriment of reduction in hours for current employees (*i.e.,* internal margins), although the Department cannot quantify this effect. Due to data limitations the Department has not estimated transfers between workers. We note, however, that most of the estimates submitted by commenters of large costs, transfers, and employment impacts rely implicitly on the assumption that employers make no adjustment to the rulemaking except to pay the overtime premium. This lack of employer response is contradicted by quantitative analysis of employer behavior (*see* Barkume,[178] for example), and by the employer comments on this rulemaking. Employers will adjust to the rule by adjusting base pay for newly nonexempt employees, as well as in other ways. After accounting for employer adjustments, the costs and transfers resulting from the rule are small relative to payroll and revenues, as are the projected reductions in employee hours, and the likelihood of large scale impacts on employment appears to be small.

Conversely, other commenters, such as the International Food Service Distributors Association, expressed concern that employers would eliminate part-time positions "where the employees value the flexibility." *See also* CUPA–HR. The Department believes it is unlikely that an employer will eliminate part-time positions simply because the workers become eligible for overtime, as an employer will not have to pay workers employed for less than 40 hours per week the overtime premium even if they are newly entitled to overtime pay.

Finally, the Home Loan and Investment Company and other commenters also asserted that some workers who currently hold only one job will need to take a second job to supplement their now reduced hours. This would reduce workers' utility since juggling two jobs is more difficult than holding one job, even if the total hours are the same. To address this concern, the Department looked at the effect of the 2004 rulemaking on the probability of multiple job holding. The 2004 rulemaking increased the salary level required to be eligible for exemption from $250 per week (short test salary level) to $455 (standard test salary level).[179] To estimate the effect of this update on the share of full-time, white collar workers holding multiple jobs, the Department conducted a difference-in-differences (DD) analysis. This analysis allows the identification of any potential regulatory impact, while controlling for time trends and a broad range of other relevant factors (education, occupation, industry, geographic location, etc.). The Department compared January–March 2004 to January–March 2005[180] and compared workers earning between $250 and $455 and those earning at least $455 but less than $600. The Department found no statistically significant change in workers' probability of holding multiple jobs before and after the 2004 Final Rule took effect.[181] However, a caveat should be noted about interpreting this result as an indication that the Final Rule will not lead to an increase in the holding of multiple jobs. This rule is estimated to affect approximately three times as many workers as the 2004 rule (for which the Department estimated 1.3 million affected workers), and factors that could not be controlled for in the analysis of the 2004 rule may lead to a different outcome based on this rule.

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[177] The deadweight loss associated with price increases is appropriately categorized as a cost, but it is discussed in detail in in section VI.D.vi because the methodology whereby it is estimated is more clearly explained as a follow-up to the transfers methodology.

[178] Barkume, A. (2010). The Structure of Labor Costs with Overtime Work in U.S. Jobs. *Industrial and Labor Relations Review,* 64(1), 128–142.

[179] The 2004 Final Rule increased the salary level from the previous long test level of $155 per week (executive and administrative exemptions) or $170 per week (professional exemption) to $455 per week. For purposes of this analysis, the Department compared the increase from the short test salary level ($250 per week) since the long test was no longer operative due to increases in the minimum wage.

[180] The 2004 Final Rule was published April 23, 2004 and went into effect August 23, 2004.

Reduced Profits

Some commenters, including an HR consultant, a small business owner, and a commenter from the restaurant industry, expressed concern that establishments with small profit margins may lose money or go out of business. The increase in workers' earnings resulting from the revised salary level is a transfer of income from firms to workers, not a cost, and is thus neutral concerning its primary effect on welfare. However, there are potential secondary effects (both costs and benefits) of the transfer due to the potential difference in the marginal utility of income and the marginal propensity to consume or save between workers and business owners. Thus, the Department acknowledges that profits may be reduced due to increased employer costs and transfer payments as a result of this rule, although some of these costs and transfers may be offset by making payroll adjustments or the profit consequences of costs and transfers partially mitigated through increased prices.[182] The Department notes that firms have a broad array of approaches for adjusting to the rulemaking: Firms that face robust demand may be able to increase product prices and may make smaller adjustments to base wages or overtime hours; firms that have little ability to raise prices may have to make more substantial changes to wages or other variables. Further, because costs and transfers are on average small relative to payroll and revenues, the Department does not expect this rulemaking to have a significant effect on profits. Additionally, increased payroll may lead to increased consumer spending which may translate into higher profits, offsetting part of the initial reduction in profits. Two business owners who commented separately in support of the Department's proposal cited an increase in sales as a likely consequence of this rulemaking.

Hiring Costs

One of Congress' goals in enacting the FLSA in 1938 was to spread employment to a greater number of workers by effectively raising the wages of employees working more than 40 hours per week. To the extent that firms respond to an update to the salary level test by reducing overtime, they may do so by spreading hours to other workers, including: Current workers employed for less than 40 hours per week by that employer, current workers who retain their exempt status, and newly hired workers. If new workers are hired to absorb these transferred hours, then the associated hiring costs are a cost of this Final Rule.

iv. Transfers

1. Overview

Transfer payments occur when income is redistributed from one party to another. The Department has quantified two possible transfers from employers to employees likely to result from this update to the salary level tests: (1) Transfers to ensure compliance with the FLSA minimum wage provision; and (2) transfers to ensure compliance with the FLSA overtime pay provision. Transfers in Year 1 to workers from employers due to the minimum wage provision were estimated to be $34.3 million. The increase in the HCE compensation level does not affect minimum wage transfers because workers eligible for the HCE exemption earn well above the minimum wage. Transfers to employees from employers due to the overtime pay provision were estimated to be $1,250.8 million, $1,152.3 million of which is from the increased standard salary level, while the remainder is attributable to the increased HCE compensation level.

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[181] The difference-in-differences model used to examine whether the share of workers holding multiple jobs increased as a result of the 2004 rule can be written as

$$M_i = \beta_0 + \beta_1 T_i + \beta_2 P_i + \beta_3 T_i * P_i + \sum_n \beta_n C_{in} + u_i,$$

where M_i is equal to 1 if worker i is has more than one job and 0 otherwise, T_i is equal to 1 if worker i earns at least $250 but less than $455 and 0 if he earns between $455 and $600, P_i is equal to 1 for the post-change period (Jan.–Mar. 2005) and 0 for the pre-change period (Jan.–Mar. 2004), and C_i is a set of worker-specific controls (age, education, gender, race, ethnicity, occupation, industry, state of residence, working overtime, whether paid hourly or salaried). The model was estimated using a probit regression. The relevant marginal effect is −0.009 (*i.e.*, the amount the likelihood of multiple job holding changes post rulemaking for workers earning between $250 and $455 per week relative to the change for workers earning between $455 and $600), with a standard deviation of 0.006. Thus, while the point estimate shows a decrease in the probability of multiple job holding for affected workers after the 2004 Final Rule took effect, the finding is not statistically significant at conventional thresholds for significance. The Department also used a difference-in-difference-in-differences model to examine whether the share of workers holding multiple jobs increased as a result of the California's increase in the salary threshold from $540 to $640 between 2006 and 2008 and from $640 to $720 between 2014 and 2015. That model can be written as

$$M_i = \beta_0 + \beta_1 T_i + \beta_2 P_i + \beta_3 T_i * P_i + \beta_4 S_i + \beta_5 T_i * S_i + \beta_6 P_i * S_i + \beta_7 T_i * P_i * S_i + \sum_n \beta_n C_{in}$$

where M_i is equal to 1 if worker i has multiple jobs and 0 otherwise, T_i is equal to 1 if worker i earns between the old threshold and the new threshold and 0 if he earns just above the new threshold, P_i is equal to 1 for the post-change period and 0 for the pre-change period, S_i is equal to 1 if worker i is in California and 0 if she is in other states where the salary level was not increased, and C_i is the same set of worker-specific controls used in the DD analysis. The model was estimated using a probit regression. For the change between 2006 and 2008, the relevant marginal effect is −0.025 with a standard deviation of 0.004, and for the change between 2014 and 2015, the relevant marginal effect is 0.042 with a standard deviation of 0.018. Thus we observe a statistically significant (at conventional thresholds) increase in the share of workers holding multiple jobs in one period but a statistically significant (at conventional thresholds) decrease in the other.

[182] As shown below, because costs and transfers generally compose less than one percent of revenues, the Department expects any such price increases to be minor.

Total Year 1 transfers were estimated to be $1,285.2 million (Table 17).

TABLE 17—SUMMARY OF YEAR 1 REGULATORY TRANSFERS

[Millions]

Transfer from employers to workers	Standard salary level	HCE Compensation level	Total
Due to minimum wage	$34.3	$0.0	$34.3
Due to overtime pay	1,152.3	98.5	1,250.8
Total transfers	1,186.6	98.5	1,285.2

Because the overtime premium depends on the base wage, the estimates of minimum wage transfers and overtime transfers are linked. This can be considered a two-step approach. The Department first identified affected EAP workers with an implicit regular hourly wage lower than the minimum wage, and then calculated the wage increase necessary to reach the minimum wage. The implicit regular rate of pay is calculated as usual weekly earnings divided by usual weekly hours worked. For those employees whose implicit regular rate of pay is below the minimum wage, the overtime premium was based on the minimum wage as the regular rate of pay.

2. Transfers Due to the Minimum Wage Provision

Transfers from employers to workers to ensure compliance with the higher of the federal or applicable state minimum wage are small compared to the transfers attributed to overtime pay and are only associated with the change in the standard salary level. For purposes of this analysis, the hourly rate of pay is calculated as usual weekly earnings divided by usual weekly hours worked. In addition to earning below the federal or state minimum wage, this set of workers also works many hours per week. To demonstrate, in order to earn less than the federal minimum wage of $7.25 per hour, but at least $455 per week, these workers must regularly work significant amounts of overtime (since $455/$7.25 = 62.8 hours). The applicable minimum wage is the higher of the federal minimum wage and the state minimum wage as of January 2016. Most affected EAP workers already receive at least the minimum wage; an estimated 11,200 affected EAP workers (less than 0.3 percent of all affected EAP workers) currently earn an implicit hourly rate of pay less than the minimum wage. The Department estimated transfers due to payment of the minimum wage by calculating the change in earnings if wages rose to the minimum wage for workers who become nonexempt and thus would have to be paid at least the minimum wage.[183]

In response to an increase in the regular rate of pay to the minimum wage, employers may reduce the workers' hours, which must be considered when estimating transfers attributed to payment of the minimum wage to newly overtime-eligible workers. In theory, because the quantity of labor hours demanded is inversely related to wages, a higher mandated wage could result in fewer hours of labor demanded. However, the weight of the empirical evidence finds that increases in the minimum wage have caused little or no significant job loss.[184] Thus, in the case of this regulation, the Department believes that any disemployment effect due to the minimum wage provision would be negligible. This is partially due to the small number of workers affected by this provision. The Department estimates the potential disemployment effects (*i.e.*, the estimated reduction in hours) of the transfer attributed to the minimum wage by multiplying the percent change in the regular rate of pay by a labor demand elasticity of −0.075.[185]

At the new standard salary level ($913 per week), the Department estimates that 11,200 affected EAP workers will on average see an hourly wage increase of $0.91, work 0.7 fewer hours per week, and receive an increase in weekly earnings of $59.10 as a result of coverage by the minimum wage provisions (Table 18). The total change in weekly earnings due to the payment of the minimum wage was estimated to be $660,300 per week ($59.10 × 11,200) or $34.3 million in Year 1.

TABLE 18—MINIMUM WAGE ONLY: MEAN HOURLY WAGES, USUAL OVERTIME HOURS, AND WEEKLY EARNINGS FOR AFFECTED EAP WORKERS, FY2017

	Hourly wage [a]	Usual weekly hours	Usual weekly earnings	Total weekly transfer (1,000s)
Before Final Rule	$8.13	69.3	$551.2	
After Final Rule	9.04	68.6	610.3	

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[183] Because these workers' hourly wages will be set at the minimum wage after this Final Rule, their employers will not be able to adjust their wages downward to offset part of the cost of paying the overtime pay premium (which will be discussed in the following section). Therefore, these workers will generally receive larger transfers attributed to the overtime pay provision than other workers.

[184] Belman, D., and P.J. Wolfson (2014). What Does the Minimum Wage Do? Kalamazoo, MI: W.E. Upjohn Institute for Employment Research. Dube, A., T.W. Lester, and M. Reich. (2010). Minimum Wage Effects Across State Borders: Estimates Using Contiguous Counties. *The Review of Economics and Statistics*, 92(4), 945–964. Schmitt, J. (2013). Why Does the Minimum Wage Have No Discernible Effect on Employment? Center for Economic and Policy Research.

[185] This is based on the estimated impact of a change in the minimum wage from $7.25 to $9.00 per hour on the employment of teenagers from the Congressional Budget Office. (2014). The Effects of a Minimum Wage Increase on Employment and Family Income. While an elasticity estimate for adult workers would be more appropriate, the report stated that the elasticity for adults was "about one-third of the elasticity" for teenagers, without providing a specific value. In addition, the literature for adults is more limited. The size of the estimated reduction in hours is thus likely to be an upper bound.

TABLE 18—MINIMUM WAGE ONLY: MEAN HOURLY WAGES, USUAL OVERTIME HOURS, AND WEEKLY EARNINGS FOR AFFECTED EAP WORKERS, FY2017—Continued

	Hourly wage[a]	Usual weekly hours	Usual weekly earnings	Total weekly transfer (1,000s)
Change	0.91	−0.7	59.1	$660.3

Note: Pooled data for FY2013–FY2015 projected to reflect FY2017.
[a] The applicable minimum wage is the higher of the federal minimum wage and the state minimum wage.

Modeling employer adjustments for these workers is a two-step process. First, employers adjust wages and hours to meet the minimum wage requirement, as described here. Then, these workers' hours will be further adjusted in response to the requirement to pay the overtime premium, which is discussed in the following section. The transfers presented here only apply to the minimum wage provision. However, minimum wage transfers impact overtime transfers because the overtime premium is calculated based on the minimum wage, not the worker's original wage. Thus, the two are not entirely separable.

3. Transfers Due to the Overtime Pay Provision

Introduction

The Final Rule will also transfer income to affected workers who work in excess of 40 hours per week. Requiring an overtime premium increases the marginal cost of labor, which employers will likely try to offset by adjusting wages or hours. Thus, the size of the transfers due to the overtime pay provision will depend largely on how employers respond to the updated salary levels. How employers respond and the ensuing changes in employment conditions will depend on the demand for labor, current wages, employer and employee bargaining power, and other factors. Employers may respond by: (1) Paying the required overtime premium to affected workers for the same number of overtime hours at the same implicit regular rate of pay; (2) reducing overtime hours and potentially transferring some of these hours to other workers; (3) increasing workers' salaries to the updated salary or compensation level; (4) reducing the regular rate of pay for workers working overtime; or (5) using some combination of these responses. How employers will respond depends on many factors, including the relative costs of each of these alternatives; in turn, the relative costs of each of these alternatives are a function of workers' earnings and hours worked.

The simplest approach to estimating these transfer payments would be to multiply an employee's regular rate of pay (after compliance with the minimum wage) by 1.5 for all overtime hours; this is referred to as the "full overtime premium" model.[186] However, due to expected wage and hour adjustments by employers, this would likely overestimate the size of the transfer. Therefore, the Department used a methodology that allows for employer adjustments, such as changes in the regular rate of pay or hours worked. The size of these adjustments is likely to vary depending on the affected worker's salary and work patterns. To model employer responses, the Department used a method that reflects the average response among all employers for all affected workers. However, individual employer responses will vary.

Literature on Employer Adjustments

Two conceptual models are useful for thinking about how employers may respond to reclassifying certain employees as overtime eligible: The "full overtime premium" model and the "employment contract" model.[187] These models make different assumptions about the demand for overtime hours and the structure of the employment agreement which result in different implications for predicting employer responses.

The full overtime premium model is based on what we will refer to as the "labor demand" model of determining wage and hour conditions. In the labor demand model, employers and employees negotiate fixed hourly wages and then subsequently negotiate hours worked, rather than determining both hours and pay simultaneously. This model assumes employees are aware of the hourly wage rate they negotiated and may be more reluctant to accept downward adjustments. The labor demand model would apply if employees had a contract to be paid at an hourly rate, meaning that employers could not reduce the regular rate of pay in response to the requirement to pay a 50 percent premium on hours worked beyond 40 in a week. However, the increase in the marginal cost of labor would lead to a reduction in the hours of labor demanded as long as labor demand is not completely inelastic. The full overtime premium model is a special case of the labor demand model in which the demand for labor is completely inelastic, that is employers will demand the same number of hours worked regardless of the cost.

In the employment contract model, employers and employees negotiate total pay and hours simultaneously, rather than negotiating a fixed hourly wage and then determining hours. Under this model, when employers are required to pay employees an overtime premium, they adjust the employees' implicit hourly rate of pay downward so that when the overtime premium is paid total employee earnings (and thus total employer cost) remain constant, along with the employees' hours. The employer does not experience a change in cost and the employee does not experience a change in earnings or hours. The employment contract model would hold if the workers who are reclassified as overtime protected had an employment agreement specifying set total earnings and hours of work.

The employment contract model tends to be more applicable when overtime hours are predictable, while the labor demand model is generally more applicable to situations where the need for overtime is unanticipated (for example, where there are unforeseen, short-term increases in demand). However, the employment contract model may not fully hold even for workers who work predictable overtime due to market imperfections, employer incentives, or workers' bargaining power. Four examples are provided.

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[186] The implicit regular rate of pay is calculated as usual weekly earnings divided by usual weekly hours worked. For example, the regular rate of pay for an employee previously ineligible for overtime whose usual weekly earnings was $600 and usual weekly hours was 50 would be $12 per hour. Under the full overtime premium model, this employee would receive $660 ((40 hours × $12) + (10 hours × $12 × 1.5)).

[187] The employment contract model is also known as the fixed-job model. *See* Trejo, S.J. (1991). The Effects of Overtime Pay Regulation on Worker Compensation. *American Economic Review,* 81(4), 719–740, and Barkume, A. (2010). The Structure of Labor Costs with Overtime Work in U.S. Jobs. *Industrial and Labor Relations Review,* 64(1), 128–142.

- Employers are constrained because they cannot reduce an employee's implicit hourly rate of pay below the minimum wage. If the employee's implicit hourly rate of pay before the change is at or below the minimum wage, then employers will not be able to reduce the rate of pay to offset the cost of paying the overtime premium.
- Employees generally have some, albeit limited, bargaining power which may prevent employers from reducing the employee's implicit hourly rate of pay to fully offset increased costs.
- Employers may be hesitant to reduce the employee's implicit hourly rate of pay by the entire amount predicted by the employment contract model because it may hurt employee morale and consequently productivity.[188]
- Employers are often limited in their ability to pay different regular rates of pay to different employees who perform the same work and have the same qualifications because of fairness concerns. In order to keep wages constant across employees and reduce wages for overtime workers, employers would need to reduce the implicit hourly rate of pay for employees who do not work overtime as well as those who do work overtime. This would reduce total earnings for these non-overtime employees (potentially causing retention problems, productivity losses, and morale concerns).[189]

Therefore, the likely outcome will fall somewhere between the conditions predicted by the full overtime premium and employment contract models. For example, the implicit hourly rate of pay may fall, but not all the way to the wage predicted by the employment contract model, and overtime hours may fall but not be eliminated since the implicit hourly rate of pay has fallen. The Department conducted a literature review to evaluate how the market would adjust to a change in the requirement to pay overtime.

Barkume (2010) and Trejo (1991) empirically tested for evidence of these two competing models by measuring labor market responses to the application of FLSA overtime pay regulations.[190] Both concluded that wages partially adjust toward the level consistent with the employment contract model in response to the overtime pay provision.[191] Barkume found that employee wage rates were adjusted downward by 40 to 80 percent of the amount the employment contract model predicted, depending on modeling assumptions. Earlier research had demonstrated that in the absence of regulation some employers may voluntarily pay workers some overtime premium to entice them to work longer hours, to compensate workers for unexpected changes in their schedules, or as a result of collective bargaining.[192] Thus Barkume assumed that workers would receive an average voluntary overtime pay premium of 28 percent in the absence of an overtime pay regulation. Including this voluntary overtime pay from employers, he estimated that in response to overtime pay regulation, the wage adjusted downward by 80 percent of the amount that would occur with the employment contract model. Conversely, when Barkume assumed workers would receive no voluntary overtime pay premium in the absence of an overtime pay regulation, wages adjusted downward 40 percent of the amount the employment contract model predicted.[193] [194] However, while it seemed reasonable that some premium was paid for overtime in the absence of regulation, Barkume's assumption of a 28 percent initial overtime premium is likely too high for the salaried workers potentially affected by a change in the salary and compensation level requirements for the EAP exemptions.[195]

Comments Regarding Transfers

The few commenters who tried to model employer responses generally used or cited the same literature the Department used (in particular, Barkume (2010) and Trejo (1991)). Susann Rohwedder and Jeffrey B. Wenger conducted an analysis for RAND on the impacts of the rulemaking and, like our analysis, found small effects on individual workers' earnings and hours.[196]

Some organizations conducted surveys to evaluate how employers may respond. Although these surveys may be helpful as background information, they generally cannot be used in a quantitative analysis due to issues such as insufficient sample sizes, missing sampling methodology, and missing magnitudes. As an example of the last concern, the American Association of Orthopaedic Executives (AAOE) conducted a survey of their members and found "19% of respondents indicated that they would change the number of staff hours worked in order to avoid paying overtime." The Department agrees firms will generally change staffing hours and has included this in the quantitative analysis. The modeling question is to what degree employers will adjust hours.

Despite the inability to incorporate these survey results into the analysis, they may be informative and select results are presented here.

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[188] For example: Bewley, T. (1999). Why Wages Don't Fall During a Recession. Cambridge, MA: Harvard University Press. Brown, C. & Medoff, J. (1989). The Employer Size Wage Effect. Quarterly Journal of Economics, 97(5), 1027–1059. See also the literature on implicit contracts in labor markets.

[189] For example: Fehr & Schmidt. (2007). "A Theory of Fairness Competition and Cooperation." Quarterly Journal of Economics. Vol 97 No. 2 pp. 867–868. Milgram, Paul. (1988). "Employment Contracts Influence Activities and Efficient Organization Design." Journal of Political Economy, Vol. 96 No. 1 pp. 42–60.

[190] Barkume, A. (2010). The Structure of Labor Costs with Overtime Work in U.S. Jobs. *Industrial and Labor Relations Review,* 64(1), 128–142. Trejo, S.J. (1991). The Effects of Overtime Pay Regulation on Worker Compensation. *American Economic Review,* 81(4), 719–740.

[191] Since both papers were based on cross-sectional data, findings were assumed to be at the final equilibrium wages. However, studies showing wage contracts are likely to be stickier in the short run than in the long run have limited applicability here since this analysis deals exclusively with salaried workers seeing an *increase* in their weekly wage while seeing a downward adjustment in their implicit hourly wage rate, and they may be less aware of their implicit hourly wage rate. The Department has modeled a sticky adjustment process by assuming the wage elasticity of demand for labor is smaller in Year 1 than in subsequent years.

[192] Barzel, Y. (1973). The Determination of Daily Hours and Wages. *The Quarterly Journal of Economics,* 87(2), 220–238 demonstrated that modest fluctuations in labor demand could justify substantial overtime premiums in the employment contract model. Hart, R.A. and Yue, M. (2000). Why Do Firms Pay an Overtime Premium? IZA Discussion Paper No. 163, showed that establishing an overtime premium in an employment contract can reduce inefficiencies.

[193] Barkume's estimates are consistent with Trejo's 1991 finding that the wage adjustment when there is no overtime premium was only about 40 percent of the full employment contract model adjustment. Trejo's estimates range from 25 percent to 49 percent and average 40 percent.

[194] Consider a worker earning $500 and working 50 hours per week. Assuming no overtime premium is paid the imputed hourly rate of pay is $10. Assuming a 28 percent overtime premium, the hourly rate of pay is $9.47 (($9.47 × 40 hours) + ($9.47 × 10 hours × 1.28)) = $500. If the hourly rate of pay was fully adjusted to the employment contract model level when overtime pay is newly required, the hourly rate of pay would be $9.09 (($9.09 × 40 hours) + ($9.09 × 10 hours × 1.5)) = $500. Forty percent of the adjustment from $10 to $9.09 results in an adjusted regular rate of pay of $9.64. Eighty percent of the adjustment from $9.47 to $9.09 results in an adjusted hourly rate of pay of $9.17. The Department took the average of these two adjusted wages to estimate that the resulting hourly rate of pay would be $9.40.

[195] Barkume (2010) based this assumption on the findings of Bell, D. and Hart, R. (2003). Wages, Hours, and Overtime Premia: Evidence from the British Labor Market. *Industrial and Labor Relations Review,* 56(3), 470–480. This study used 1998 data on male, non-managerial, full-time workers in Britain. British workers were likely paid a larger voluntary overtime premium than American workers because Britain did not have a required overtime pay regulation and so collective bargaining played a larger role in implementing overtime pay.

[196] Rohwedder, S. and Wenger, J.B. (2015). The Fair Labor Standards Act: Worker Misclassification and the Hours and Earnings Effects of Expanded Coverage. RAND Labor and Population.

- The AAOE found "18% [of members] indicated that they would not change their current practice operations. 16% stated that they would increase salaries to the new threshold. 11% would change the affected employees to hourly employees, and 4% stated that they would eliminate positions within their practice." This indicates employers will use a variety of mechanisms to reduce transfer payments, as discussed and modeled by the Department.
- The 2015 WorldatWork survey found "73% of respondents stated they would have more nonexempt employees."
- Kansas Bankers Association compiled member banks' analyses of the rule that found "[o]verwhelmingly . . . the response was not to increase the newly non-exempt salaries to continue to keep the position as an exempt position. In fact, only 2 bank CEOs responded that they would choose to do so. Rather, the overwhelming majority of bank CEOs stated those employees would move to non-exempt status, and overtime would be restricted or prohibited."
- The NAHB presented results from a member survey that found 33 percent of companies indicated a change in company policies, with respect to construction supervisors, would occur. Among those firms, "56% of respondents indicated that they would take steps to minimize overtime, such as cut workers hours."
- ANCOR found "[l]ess than a third of providers would be able to increase the salary of full-time exempt workers to meet the projected threshold."
- Society for Human Resource Management (SHRM) reported that, according to its survey "the most significant result identified was the implementation of restrictive overtime policies leading to potential reduction in employees working overtime, with 70 percent of respondents indicating that would be a likely outcome."
- AGC reported its survey found "74% of AGC-surveyed construction contractors responded that they would likely reclassify some or all of the impacted exempt workers to a non-exempt hourly status at their current salaries. The survey results also show that: Over 60% of respondents expect the proposed rule to result in the institution of policies and practices to ensure that affected employees do not work over 40 hours a week."
- International Public Management Association for Human Resources (IMPA–HR) and the International Municipal Lawyers Association reported from an IPMA–HR survey that "[a]bout 60% said they would convert currently exempt employees to non-exempt and pay them overtime while the same amount would prohibit them from working more than 40 hours per week without approval. Only 1/3 would raise salaries to at least $970 per week."
- National Association of Professional Insurance Agents asked survey respondents with workers who would be converted to nonexempt status and who work overtime whether they would decrease overtime hours; 65 percent responded they would.

Some commenters stated that many employers will respond by reducing hours and base wages more than the Department estimated. The National Association of Manufacturers wrote:

> While in the initial months following a reclassification, most employees tend to come out about the same in terms of total work and total compensation, the steady pressure of the overtime premium tends to result in a gradual reduction of the employee's schedule. The challenge for that employee is that the hourly rate does not normally increase to offset this loss in hours. Instead, the employer looks to give the work to other employees. The scaling back of the employee's weekly working hours can take a significant toll on the employee's earnings, especially given that the wages lost for each hour of overtime eliminated are at premium rates. The net economic effect of the Proposed Rule will be to take working hours and pay away from employees currently classified as exempt and redistribute those hours and pay to other employees.

Some commenters, including Jackson Lewis, the National RV Dealers Association, and the Sheppard Mullin law firm, asserted that many employers may follow the full employment contract model rather than the partial employment contract model used by the Department in the analysis. The Iowa Association of Community Providers wrote that "[i]n order to maintain current payroll budgets, the organizations will need to lower the hourly wages of non-exempt employees, such that their total annual compensation, including overtime payments, remains at the prior year's level." The Construction Industry Round Table asserted that "empirical research generally supports the 'fixed-job' model rather than the 'fixed-wage' model."

Other commenters stated that overtime will be reduced significantly more than the Department estimated in the NPRM. However, little data was provided to support these claims, making them difficult to incorporate into the analysis. For example, Audubon Area Community Services believes that "[b]ecause additional revenue is not an option, our agency would have to reclassify all but 10 of our positions to non-exempt with no overtime allowed by any staff."

The Department's reading and analysis of the literature cited in the rulemaking is that a result between the fixed-job model and the fixed-wage model would occur and thus we modeled our results accordingly. Specifically, based upon Barkume's findings regarding employer responses and transfer payments, we believe the partial employment contract model is most appropriate and consistent with the literature. Therefore, we have not changed the analysis. Several commenters commented on the literature we used to support using the partial employment contract model. The Center for American Progress expressed support for our use of Barkume's analysis and stated that this would result in some transfer payments since employers cannot fully adjust base wages. The Washington Center for Equitable Growth noted the Department "should make clear that under certain conditions the fixed-wage model underlying [the Department's] analysis implies that some workers will see an increase in hours. If these workers are under-employed, the shift in the composition of those hours from over-worked to under-worked employees will be a welfare-improving consequence of the proposed rule."

Identifying Types of Affected Workers

The Department identified four types of workers whose work characteristics impact how employers were modeled to respond to the changes in both the standard and HCE salary levels:

- Type 1: Workers who do not work overtime.
- Type 2: Workers who do not regularly work overtime but occasionally work overtime.
- Type 3: Workers who regularly work overtime.
- Type 4: Workers who regularly work overtime. These workers differ from the Type 3 workers because it is less expensive for the employer to pay the updated salary level than pay overtime and incur managerial costs for these workers.[197]

The Department began by identifying the number of workers in each type. After modeling employer adjustments, transfer payments were then estimated. Type 3 and 4 workers are identified as those who regularly work overtime (CPS variable PEHRUSL1 greater than 40). These workers are divided between Type 3 and Type 4 depending on whether their weekly earnings are raised to the updated EAP salary level or they become nonexempt. Distinguishing Type 3 workers from Type 4 workers is a four step process. First we identify all workers who regularly work overtime. Then we estimate each worker's weekly earnings if they became nonexempt, to which we add weekly managerial costs for each affected worker of $3.53 ($42.31 per hour × (5 minutes/60 minutes)). Lastly, we identify as Type 4 those workers whose expected nonexempt earnings plus weekly managerial costs exceeds the updated standard salary level; those whose expected nonexempt earnings plus weekly managerial costs are less than the new standard salary level are classified as Type 3 workers. The Department assumes that firms will include incremental managerial costs in their determination of whether to treat an affected employee as a Type 3 or Type 4 worker because those costs are only incurred if the employee is a Type 3 worker. Thus, it is appropriate to determine if the additional earnings plus the additional managerial costs for an affected worker exceed the revised salary level. In the NPRM managerial costs were not included in the determination of whether a worker is a Type 3 or Type 4 worker. Therefore, in this Final Rule there are somewhat more Type 4 workers than the NPRM methodology would yield.

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[197] It is possible that employers will increase the salaries paid to some "occasional" overtime workers to maintain the exemption for the worker, but the Department has no way of identifying these workers.

Identifying Type 2 workers involves two steps. First, using CPS MORG data, the Department identified those who do not usually work overtime but did work overtime in the survey week (the week referred to in the CPS questionnaire, variable PEHRACT1 greater than 40). These workers represent those who occasionally work overtime and happened to work overtime in that specific week. The survey (or reference) week is always the pay period that includes the 12th day of the month and contains responses for all twelve months. In a different week the identity of workers who work overtime might differ, but the number working overtime and the hours of overtime worked are similar because the survey week is representative of occasional overtime patterns.

The second step for identifying Type 2 workers in the Final Rule differs from the methodology used in the NPRM. In the NPRM, we used only the first step described above to identify Type 2 workers. Those who did not regularly work overtime and did not work overtime in the survey week were classified as Type 1 workers. As previously discussed, commenters expressed concerns that the Department underestimated the number of workers who will experience changes in their wages or hours, and therefore that we underestimated costs, because managerial costs are a function of the number of workers who work overtime.

Therefore, for this Final Rule, the Department supplemented the CPS data with data from the Survey of Income and Program Participation (SIPP) in order to look at likelihood of working some overtime during the year. Based on 2012 data, the most recent available, the Department found that 39.4 percent of nonhourly workers worked overtime at some point in a year. Workers already identified as Types 2, 3, and 4, using the methodology in the NPRM, compose 24 percent of affected workers. Therefore, as a second step, the Department classified a share of workers who reported they do not usually work overtime, and did not work overtime in the reference week (previously identified as Type 1 workers), as Type 2 workers such that a total of 39.4 percent of affected workers were Type 2, 3, or 4. Therefore, the Department estimates fewer Type 1 workers and more Type 2 workers than in the NPRM.

Modeling Changes in Wages and Hours

In practice, employers do not seem to adjust wages of regular overtime workers to the full extent indicated by the employment contract model, and thus employees appear to get a small but significant increase in weekly earnings due to overtime pay coverage. Barkume and Trejo found evidence partially supporting both the employment contract model and the full overtime premium model in response to a 50 percent overtime premium requirement: A decrease in the regular rate of pay for workers with overtime (but not the full decrease to the employment contract model level) and a decrease in the amount of overtime worked. Therefore, when modeling employer responses with respect to the adjustment to the regular rate of pay, the Department used a method that falls somewhere between the employment contract model and the full overtime premium model (*i.e.*, the partial employment contract model).

Barkume reported two methods to estimate this partial employment contract wage, depending on the amount of overtime pay assumed to be paid in the absence of regulation. As noted above, the Department believes both the model assuming a voluntary 28 percent overtime premium and the model assuming no voluntary overtime premium are unrealistic for the affected population. Therefore, lacking more information, the Department determined that an appropriate estimate of the impact on the implicit hourly rate of pay for regular overtime workers after the Final Rule should be determined using the average of Barkume's two estimates of partial employment contract model adjustments: A wage change that is 40 percent of the adjustment toward the amount predicted by the employment contract model, assuming an initial zero overtime pay premium, and a wage change that is 80 percent of the adjustment assuming an initial 28 percent overtime pay premium.[198] This is approximately equivalent to assuming that salaried overtime workers implicitly receive the equivalent of a 14 percent overtime premium in the absence of regulation (the mid-point between 0 and 28 percent).

Modeling changes in wages, hours, and earnings for Type 1 and Type 4 workers is relatively straightforward. Type 1 affected EAP workers will become overtime eligible, but since they do not work overtime, they will see no change in their weekly earnings. Type 4 workers will remain exempt because their earnings will be raised to the updated EAP salary level (either the standard salary level or HCE compensation level depending on which test the worker passed). These workers' earnings will increase by the difference between their current earnings and the amount necessary to satisfy the new standard salary requirement or comply with the new total annual compensation level. It is possible employers will increase these workers' hours in response to paying them a higher salary, but the Department has not modeled this potential change.[199]

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[198] Both studies considered a population that included hourly workers. Evidence is not available on how the adjustment towards the employment contract model differs between salaried and hourly workers. The employment contract model may be more likely to hold for salaried workers than for hourly workers since salaried workers directly observe their weekly total earnings, not their implicit equivalent hourly wage. Thus, applying the partial adjustment to the employment contract model as estimated by these studies may overestimate the transfers from employers to salaried workers. We note that such an out-of-sample extrapolation has the potential to introduce uncertainty, just as there is uncertainty associated with other effects, such as the replacement of full-time jobs with part-time jobs, where studies have suggested directionally non-beneficial effects that are not statistically significant. Due to the lack of modeling results for salaried employees in the employment contract model, we do not attempt to quantify the magnitude of this uncertainty or potential overestimate.

[199] Cherry, Monica, "Are Salaried Workers Compensated for Overtime Hours?" *Journal of*

Modeling changes in wages, hours, and earnings for Type 2 and Type 3 workers is more complex and uses findings from Barkume discussed above. The Department distinguishes those who regularly work overtime (Type 3 workers) from those who occasionally, or irregularly, work overtime (Type 2 workers) because employer adjustment to the Final Rule may differ accordingly. The Department believes that employers are more likely to adjust hours worked and wages for regular overtime workers because their hours are predictable. Conversely, it may be more difficult to adjust hours and wages for occasional overtime workers because employers may be responding to a transient, perhaps unpredicted, shift in market demand for the good or service they provide. In this case, it is likely advantageous for the employer to pay for this occasional overtime rather than to adjust permanent staffing. Additionally, the transient and possibly unpredicted nature of the change may make it difficult to adjust wages for these workers.

The Department treats Type 2 affected workers in two ways due to the uncertainty of the nature of these occasional overtime hours worked. If these workers work extra hours on an unforeseen, short-term, as-needed basis (*e.g.,* to adjust to unanticipated increases in demand), then there may be less opportunity for employers to adjust straight-time wages downward.[200] However, if these workers work extra hours on a foreseen, periodic basis (*e.g.,* work a few extra hours one week each month, but workers do not consider it "regular overtime" because they do not work overtime during three weeks each month), then there may be some opportunity for employers to adjust straight-time wages downward (*e.g.,* so pre- and post-revision monthly income is more similar). That this overtime is periodic and predictable is what makes it much more similar to that worked by Type 3 workers, and provides employers with more opportunity to adjust hours and wages. Since in reality there is likely a mix of these two occasional overtime scenarios, the Department combines models representing these two scenarios when estimating impacts.

Our estimate for how Type 2 workers are affected is based on the assumption that 50 percent of these workers who worked occasional overtime worked *expected* overtime hours and the other 50 percent worked *unexpected* overtime.[201] Workers were randomly assigned to these two groups. Workers with *expected* occasional overtime hours were treated like Type 3 affected workers (partial employment contract model adjustments). Workers with *unexpected* occasional overtime hours were assumed to receive a 50 percent pay premium for the overtime hours worked and receive no change in base wage or hours (full overtime premium model). When modeling Type 2 workers' hour and wage adjustments, we treated those identified as Type 2 using the CPS data as representative of all Type 2 workers. We estimated employer adjustments and transfers assuming that the patterns observed in the CPS reference week are representative of an average week in the year. Thus, we assume total transfers for the year are equal to 52 times the transfers estimated for the single representative week for which we have CPS data. However, these transfers are spread over a larger group including those who occasionally work overtime but did not do so in the CPS reference week.[202] [203]

Since Type 2 and Type 3 EAP workers work more than 40 hours per week, whether routinely or occasionally, they will receive an overtime premium based on their implicit hourly wage adjusted as described above. Because employers must now pay more for the same number of labor hours, they will seek to reduce those hours; in economics, this is described as a decrease in the quantity of labor hours demanded (a movement to the left along the labor demand curve). It is the net effect of these two changes that will determine the final weekly earnings for affected EAP workers. The reduction in hours is calculated using the elasticity of labor demand with respect to wages. The Department used a short-run demand elasticity of -0.20 to estimate the percentage decrease in hours worked resulting from the increase in average hourly wages in Year 1, calculated using the adjusted base wage and the overtime wage premium.[204] The interpretation of the short run demand elasticity in this context is that a 10 percent increase in wages will result in a 2 percent decrease in hours demanded. Transfers projected for years 2 through 10 used a long-run elasticity; this is discussed in section VI.D.x.[205]

For Type 3 affected workers, and the 50 percent of Type 2 affected workers who worked *expected* overtime, we estimated adjusted total hours worked after making wage adjustments using the partial employment contract model. To estimate adjusted hours worked, we set

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Labor Research 25(3): 485–494, September 2004, found that exempt full-time salaried employees earn more when they work more hours, but we have chosen not to use her results for the quantification of the effect *on* hours of an increase in earnings.

[200] Employers may be reluctant to reset hourly wage rates to respond to unexpected changes to the need for overtime because the negative impact on worker morale may outweigh the gains from adjusting wages to unexpected shifts in demand. Of relevance is the well-established literature that shows employers do not quickly adjust wages downward in response to downturns in the economy; the same logic applies to our approach to unexpected changes in demand. See, for example: Bewley, T. (1999). Why Wages Don't Fall During a Recession. Cambridge, MA: Harvard University Press. See also Barzel, Y. (1973). The Determination of Daily Hours and Wages. *The Quarterly Journal of Economics,* 87(2), 220–238.

[201] Trejo's and Barkume's adjustments are averages; excluding some workers (*i.e.,* half of Type 2 workers) from these adjustments could potentially bias the size of the adjustment for the workers who continue to receive the adjustment. This bias would exist if Barkume and Trejo estimated the average adjustment for a sample of workers including irregular overtime workers and the size of the adjustment for these workers differs from other workers. It is not clear whether Trejo's and Barkume's samples include both occasional and regular overtime workers; however, the Department's interpretation is that Trejo includes only workers who usually work overtime and Barkume includes both. If these assumptions are correct, the magnitude of this RIA's adjustment made for the workers whose wages and hours are adjusted would be appropriate if it were applying Trejo's results but may, due to applying Barkume's, result in an underestimate of the average fall in base wages. We believe the magnitude of any potential bias will be small because the half of Type 2 workers who are occasional, regular overtime workers in the CPS reference week (and thus treated differently) compose only 9 percent of Type 2 and Type 3 workers.

[202] Because these workers do not work overtime every week, the size of the wage and hour adjustments will be smaller than modeled. However, we are only modeling wage and hour adjustments for a subset of workers. If the wage and hour adjustments are linear, then our modeling assumptions should yield the same aggregate results as making smaller adjustments for all workers.

[203] If a different week was chosen as the survey week, then likely some of these workers would not have worked overtime. However, because the data are representative of both the population and all twelve months in a year, the Department believes the share of Type 2 workers identified in the CPS data in the given week is representative of an average week in the year.

[204] This elasticity estimate is based on the Department's analysis of Lichter, A., Peichl, A. & Siegloch, A. (2014). The Own-Wage Elasticity of Labor Demand: A Meta-Regression Analysis. IZA DP No. 7958. Some researchers have estimated larger impacts on the number of overtime hours worked (Hamermesh, D. and S. Trejo. (2000). The Demand for Hours of Labor: Direct Evidence from California. *The Review of Economics and Statistics,* 82(1), 38–47 concludes the price elasticity of demand for overtime hours is at least -0.5. The Department decided to use a general measure of elasticity applied to the average change in wages since the increase in the overtime wage is somewhat offset by a decrease in the non-overtime wage as indicated in the employment contract model. The Department invited comments on the appropriate elasticity to be used in this analysis, but no relevant comments were received.

[205] In the short run not all factors of production can be changed and so the change in hours demanded is smaller than in the long run, when all factors are flexible.

the percent change in total hours worked equal to the percent change in average wages multiplied by the wage elasticity of labor demand.[206] The percent change in average wages is equal to the adjusted implicit average hourly wage minus the original implicit average hourly wage divided by the original implicit average hourly wage. The original implicit average hourly wage is equal to original weekly earnings divided by original hours worked. The adjusted implicit average hourly wage is equal to adjusted weekly earnings divided by adjusted total hours worked. Adjusted weekly earnings equals the adjusted hourly wage (*i.e.,* after the partial employment contract model adjustment) multiplied by 40 hours plus adjusted hours worked in excess of 40 multiplied by 1.5 times the adjusted hourly wage.

Figure 4 is a flow chart summarizing the four types of affected EAP workers. Also shown are the impacts on exempt status, weekly earnings, and hours worked for each type of affected worker.

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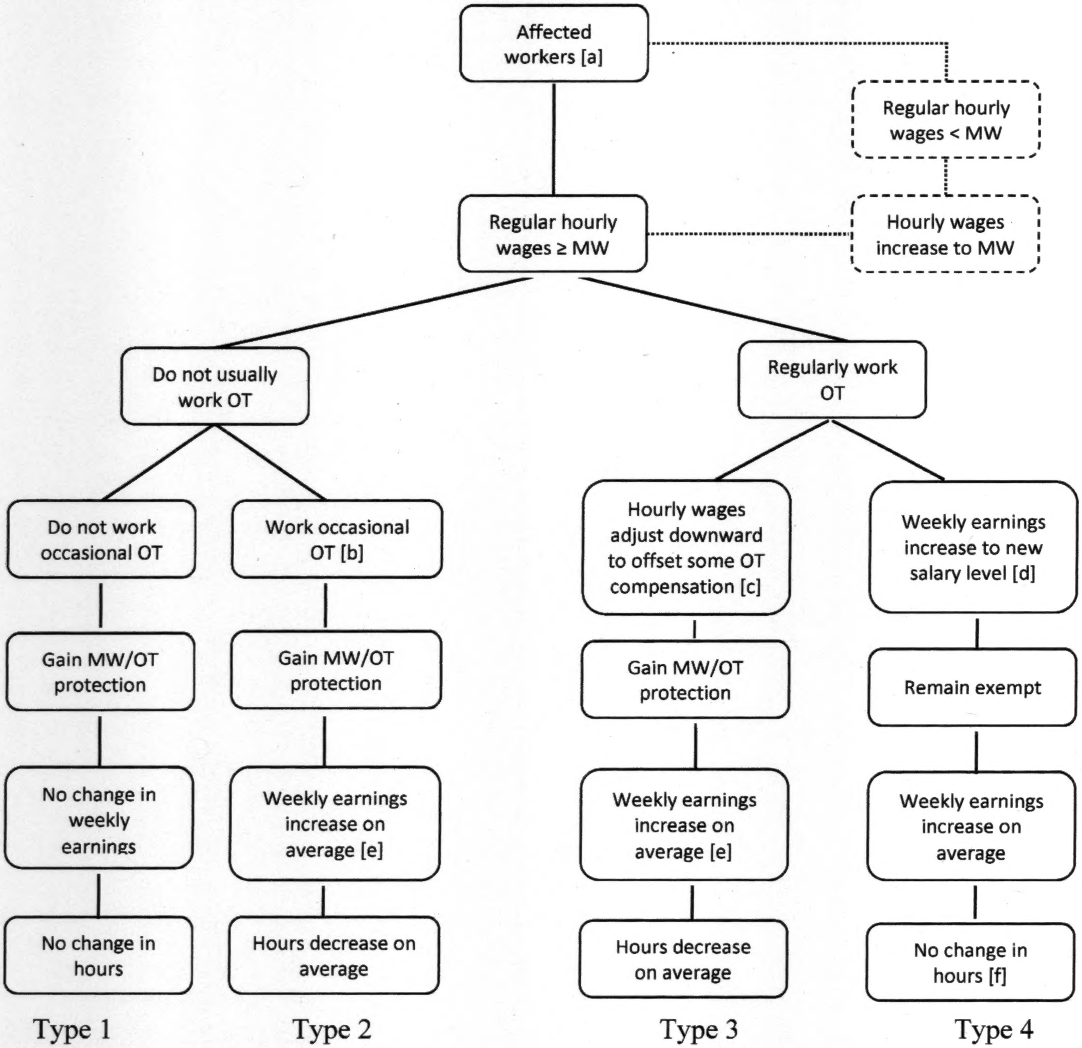
[206] In this equation, the only unknown is adjusted total hours worked. Since adjusted total hours worked is in the denominator of the left side of the equation and is also in the numerator of the right side of the equation, solving for adjusted total hours worked requires solving a quadratic equation.

Figure 4: Flow Chart of Final Rule's Impact on Earnings and Hours Worked


Affected workers [a]
Regular hourly wages < MW
Hourly wages increase to MW
Regular hourly wages ≥ MW
Do not usually work OT
Regularly work OT
Do not work occasional OT
Work occasional OT [b]
Hourly wages adjust downward to offset some OT compensation [c]
Weekly earnings increase to new salary level [d]
Gain MW/OT protection
Gain MW/OT protection
Gain MW/OT protection
Remain exempt
No change in weekly earnings
Weekly earnings increase on average [e]
Weekly earnings increase on average [e]
Weekly earnings increase on average
No change in hours
Hours decrease on average
Hours decrease on average
No change in hours [f]
Type 1
Type 2
Type 3
Type 4

[a] Affected EAP workers are those who are exempt under the current EAP exemptions and would gain minimum wage and overtime protection or receive a raise to the increased salary or compensation level.

[b] There are two methods the Department uses to identify occasional overtime workers. The first includes workers who report they usually work 40 hours or less per week (identified with variable PEHRUSL1 in CPS MORG) but in the reference week worked more than 40 hours (variable PEHRACT1 in CPS MORG). The second includes reclassifying some additional workers who usually work 40 hours or less per week, and in the reference week worked 40 hours or less, to match the proportion of workers measured in other data sets who work overtime at any point in the year.

[c] The amount wages are adjusted downwards depends on whether the employment contract model or the labor demand model holds. The Department's preferred method uses a combination of the two. Employers reduce the regular hourly wage rate somewhat in response to overtime pay requirements, but the wage is not reduced enough to keep total compensation constant.

[d] Based on hourly wage and weekly hours it is more cost efficient for the employer to increase the worker's weekly salary to the updated salary level than to pay overtime pay.

[e] This is what happens on average, although some employers may redistribute hours to reduce overtime, resulting in a decrease in some workers' overall earnings.

[f] The Department assumed hours would not change due to lack of data and relevant literature; however, it is possible employers will increase these workers' hours in response to paying them a higher salary.

Estimated Number of and Impacts on Affected EAP Workers

The Department projects 4.2 million workers will be affected by either (1) an increase in the standard salary level to the 40th percentile of weekly earnings of full-time salaried workers in the South because they earn salaries of at least $455 per week and less than $913 per week, or (2) an increase in the HCE compensation level to the 90th percentile of earnings of full-time salaried workers nationwide because they only pass the HCE duties test and earn at least $100,000 and less than $134,004 annually. These workers are categorized into the four "types" identified previously. There are 2.6 million Type 1 workers (60.4 percent of all affected EAP workers), those who work 40 hours per week or less and thus will not be paid an overtime premium despite their expected change in status to overtime protected (Table 19). The number of Type 1 workers decreased from the NPRM because some of these workers are now classified as Type 2 workers (as explained above). Type 2 workers, those who are expected to become overtime eligible and do not usually work overtime but do occasionally work overtime and will be paid the overtime premium, total 817,000 (19.3 percent of all affected EAP workers). Type 3 workers, those who regularly work overtime and are expected to become overtime eligible and be paid the overtime premium, are composed of an estimated 759,000 workers (17.9 percent of all affected EAP workers). The number of affected Type 4 workers was estimated to be 96,000 workers (2.3 percent of all affected workers); these are workers who the Department believes will remain exempt because firms will have a financial incentive to increase their weekly salaries to the updated salary and compensation levels, rather than pay a premium for overtime hours.[207]

TABLE 19—AFFECTED EAP WORKERS BY TYPE (1,000s), FY2017

	Total	No overtime (T1)	Occasional overtime (T2)	Regular overtime	
				Newly nonexempt (T3)	Remain exempt (T4)
Standard salary level	4,163	2,523	815	730	95
HCE compensation level	64.9	32.5	2.7	28.5	1.2
Total	4,228	2,555	817	759	96

Note: Pooled data for FY2013–FY2015 projected to reflect FY2017.

***Type 1:** Workers without regular OT and without occasional OT and become overtime eligible.

***Type 2:** Workers without regular OT but with occasional OT. These workers become overtime eligible. Paid overtime premium pay, so average weekly earnings increase, but regular rate of pay and hours fall for 50 percent of workers who regularly work occasional overtime.

***Type 3:** Workers with regular OT who become overtime eligible. Paid overtime premium pay, so average weekly hours increase, but regular rate of pay and hours fall.

***Type 4:** Workers with regular OT who remain exempt (*i.e.,* earnings increase to the updated salary level).

The Final Rule will likely impact some affected workers' hourly wages, hours, and weekly earnings. Predicted changes in implicit wage rates are outlined in Table 20; changes in hours in Table 21; and changes in weekly earnings in Table 22. How these will change depends on the type of worker, but on average weekly earnings are unchanged or increase while hours worked are unchanged or decrease.

Type 1 workers will have no change in wages, hours, or earnings.[208] Estimating changes in the regular rate of pay for Type 3 workers and the 50 percent of Type 2 workers who regularly work occasional overtime requires application of the partial employment contract model, which predicts a decrease in their average regular rates of pay. The Department estimates that employers would decrease these workers' regular hourly rates of pay to the amount predicted by the partial employment contract model adjustment. Employers are assumed to be unable to adjust the hours or regular rate of pay for the occasional overtime workers whose overtime is irregularly scheduled and unpredictable (the remaining 50 percent of Type 2 workers); therefore, their earnings will increase because they will receive the overtime premium for their unpredictable overtime hours. As a group, Type 2 workers currently exempt under the standard test would see a decrease in their average regular hourly wage (*i.e.*, excluding the overtime premium) from $19.00 to $18.92, a decrease of 0.4 percent (Table 20). Type 2 workers paid between $100,000 and the updated HCE compensation level would see an average decrease in their regular hourly wage from $57.73 to $55.02, a decrease of 4.7 percent. However, because workers will now receive a 50 percent premium on their regular hourly wage for each hour worked in excess of 40 hours per week, average weekly earnings for Type 2 workers would increase.[209]

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[207] As previously described, the Department calculated a wage and hour adjustment for all regular overtime workers. Consider, by way of example, a worker who initially earned $900 and worked 70 hours per week. Suppose the partial employment contract adjustment results in a regular rate of pay of $11.94 and 69.5 hours worked per week. After the partial employment contract adjustments, this worker would receive approximately $1,006 per week ((40 × $11.94) + (29.5 × ($11.94 × 1.5)). Since this is greater than the proposed standard salary level, the Department estimated that this worker would have his salary increased to $913 and remain exempt.

[208] It is possible that these workers may experience an increase in hours and weekly earnings because of transfers of hours from overtime workers. Due to the high level of uncertainty in employers' responses regarding the transfer of hours, the Department did not have credible evidence to support an estimation of the number of hours transferred to other workers.

Type 3 workers will also receive decreases in their regular hourly wage as predicted by the partial employment contract model. Type 3 affected workers paid below the new standard salary level would have their regular hourly rate of pay decrease on average from $14.51 to $13.74 per hour, a decrease of 5.3 percent. Type 3 workers paid between $100,000 and the new HCE compensation level would have their regular rate of pay decrease on average from $41.43 to $38.80 per hour, a decrease of 6.3 percent. Again, although regular hourly rates decline, weekly earnings will increase on average because these workers are now eligible for the overtime premium.

Type 4 workers' implicit hourly rates of pay would increase in order for their earnings to meet the updated standard salary level ($913 per week) or the updated HCE annual compensation level ($134,004 annually). The implicit hourly rate for Type 4 affected EAP workers who had earned at least $455 and below $913 per week would *increase* on average from $17.32 to $17.54 (a 1.3 percent increase). The implicit hourly rate of pay for Type 4 workers who had earned between $100,000 and $134,004 annually would *increase* on average from $49.97 to $50.76 (a 1.6 percent increase).

TABLE 20—AVERAGE REGULAR RATE OF PAY BY TYPE OF AFFECTED EAP WORKER, FY2017

	Total	No overtime (T1)	Occasional overtime (T2)	Regular overtime	
				Newly nonexempt (T3)	Remain exempt (T4)
Standard Salary Level					
Before Final Rule	$18.39	$19.36	$19.00	$14.51	$17.32
After Final Rule	$18.25	$19.36	$18.92	$13.74	$17.54
Change ($)	−$0.15	$0.00	−$0.08	−$0.77	$0.23
Change (%)	−0.8%	0.0%	−0.4%	−5.3%	1.3%
HCE Compensation Level					
Before Final Rule	$49.62	$56.13	$57.73	$41.43	$49.97
After Final Rule	$48.37	$56.13	$55.02	$38.80	$50.76
Change ($)	−$1.25	$0.00	−$2.72	−$2.63	$0.79
Change (%)	−2.5%	0.0%	−4.7%	−6.3%	1.6%

Note: Pooled data for FY2013–FY2015 projected to reflect FY2017.
***Type 1:** Workers without regular OT and without occasional OT and become overtime eligible.
***Type 2:** Workers without regular OT but with occasional OT. These workers become overtime eligible. Paid overtime premium pay, so average weekly earnings increase, but regular rate of pay and hours fall for 50 percent of workers who regularly work occasional overtime.
***Type 3:** Workers with regular OT who become overtime eligible. Paid overtime premium pay, so average weekly earnings increase, but regular rate of pay and hours fall.
***Type 4:** Workers with regular OT who remain exempt (*i.e.*, earnings increase to the updated salary level).

Type 1 and Type 4 workers would have no change in hours. Type 1 workers' hours would not change because they do not work overtime and thus the requirement to pay an overtime premium does not affect them. Type 4 workers' hours may increase, but due to lack of data, the Department assumed hours would not change. Half of Type 2 and all Type 3 workers would see a small decrease in their hours of overtime worked. This reduction in hours is relatively small and is due to the effect on labor demand from the increase in the average hourly base wage as predicted by the employment contract model.

Type 2 workers who work occasional overtime hours would be newly overtime eligible and would see a negligible decrease in average weekly hours in weeks where occasional overtime is worked (0.1 percent decrease) (Table 21).[210] This is the average change across all weeks, including weeks without overtime, in which the decrease in hours is zero. Type 2 workers who would no longer earn the updated HCE compensation level would see a decrease in average weekly hours in applicable weeks from 48.5 to 48.2 (0.5 percent). Type 3 workers affected by the increase in the standard salary level would see a decrease in hours worked from 50.8 to 50.3 hours per week (0.8 percent). Type

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[209] Type 2 workers do not see increases in regular earnings to the new salary level (as Type 4 workers do) even if their new earnings exceed that new level. This is because the estimated new earnings only reflect their earnings in that week when overtime is worked; their earnings in typical weeks that they do not work overtime do not exceed the salary level.

[210] The Department estimates that half of Type 2 workers (those who work unpredictable overtime hours) will not see a reduction in their hours; however as a group, Type 2 workers are expected to experience a reduction in their hours of work. Because only half these workers experience a change in hours and because they work less overtime on average, the aggregate change is smaller than for Type 3 workers.

3 workers affected by the increase in the HCE compensation level would see an average decrease from 52.4 to 52.0 hours per week (0.7 percent).

TABLE 21—AVERAGE WEEKLY HOURS FOR AFFECTED EAP WORKERS BY TYPE, FY2017

	Total	No overtime worked (T1)	Occasional OT (T2)	Regular OT	
				Newly nonexempt (T3)	Remain exempt (T4)
Standard Salary Level [a]					
Before Final Rule	41.4	38.6	40.3	50.8	53.5
After Final Rule	41.3	38.6	40.3	50.3	53.5
Change ($)	−0.1	0.0	0.0	−0.4	0.0
Change (%)	−0.2%	0.0%	−0.1%	−0.8%	0.0%
HCE Compensation Level [a]					
Before Final Rule	45.5	39.0	48.5	52.4	51.1
After Final Rule	45.3	39.0	48.2	52.0	51.1
Change ($)	−0.2	0.0	−0.3	−0.4	0.0
Change (%)	−0.4%	0.0%	−0.5%	−0.7%	0.0%

Note: Pooled data for FY2013–FY2015 projected to reflect FY2017.

[a] Usual hours for Types 1, 3, and 4 but actual hours for Type 2 workers identified in the CPS MORG.

***Type 1:** Workers without regular OT and without occasional OT and become overtime eligible.

***Type 2:** Workers without regular OT but with occasional OT. These workers become overtime eligible. Paid overtime premium pay, so average weekly earnings increase, but regular rate of pay and hours fall for 50 percent of workers who regularly work occasional overtime.

***Type 3:** Workers with regular OT who become overtime eligible. Paid overtime premium pay, so average weekly earnings increase, but regular rate of pay and hours fall.

***Type 4:** Workers with regular OT who remain exempt (*i.e.*, earnings increase to the updated salary level).

Because Type 1 workers do not experience a change in their regular rate of pay or hours, they would have no change in earnings due to the Final Rule (Table 22). While their hours are not expected to change, Type 4 workers' salaries would increase to the new standard salary level or HCE compensation level (depending on which test they pass). Thus, Type 4 workers' average weekly earnings would increase by $12.70 (1.4 percent) for those affected by the change in the standard salary level and by $41.58 per week (1.6 percent) for those affected by the HCE compensation level.

Although both Type 2 and Type 3 workers on average experience a decrease in both their regular rate of pay and hours worked, their weekly earnings are expected to increase as a result of the overtime premium. Based on a standard salary level of $913 per week, Type 2 workers' average weekly earnings increase from $751.47 to $760.11, a 1.1 percent increase. The average weekly earnings of Type 2 workers affected by the change in the HCE compensation level were estimated to increase from $2,778.65 to $2,836.63, a 2.1 percent increase. For Type 3 workers affected by the standard salary level, average weekly earnings would increase from $723.86 to $743.83, an increase of 2.8 percent. Type 3 workers affected by the change in the HCE compensation level have an increase in average weekly earnings from $2,136.91 to $2,196.10, an increase of 2.8 percent. Weekly earnings after the standard salary level increased were estimated using the new wage (*i.e.*, the partial employment contract model wage) and the reduced number of overtime hours worked.

TABLE 22—AVERAGE WEEKLY EARNINGS FOR AFFECTED EAP WORKERS BY TYPE, FY2017

	Total	No overtime (T1)	Occasional overtime (T2)	Regular overtime	
				Newly nonexempt (T3)	Remain exempt (T4)
Standard Salary Level [a]					
Before Final Rule	$733.65	$724.45	$751.47	$723.86	$900.30
After Final Rule	$739.13	$724.45	$760.11	$743.83	$913.00
Change ($)	$5.48	$0.00	$8.63	$19.97	$12.70
Change (%)	0.7%	0.0%	1.1%	2.8%	1.4%
HCE Compensation Level [a]					
Before Final Rule	$2,180.55	$2,155.94	$2,778.65	$2,136.91	$2,535.42
After Final Rule	$2,209.75	$2,155.94	$2,836.63	$2,196.10	$2,577.00
Change ($)	$29.19	$0.00	$57.98	$59.19	$41.58
Change (%)	1.3%	0.0%	2.1%	2.8%	1.6%

Note: Pooled data for FY2013–FY2015 projected to reflect FY2017.

[a] The mean of the hourly wage multiplied by the mean of the hours does not necessarily equal the mean of the weekly earnings because the product of two averages is not necessarily equal to the average of the product.

*Type 1: Workers without regular OT and without occasional OT and become overtime eligible.

*Type 2: Workers without regular OT but with occasional OT. These workers become overtime eligible. Paid overtime premium pay, so average weekly earnings increase, but regular rate of pay and hours fall for 50 percent of workers who regularly work occasional overtime.

*Type 3: Workers with regular OT who become overtime eligible. Paid overtime premium pay, so average weekly earnings increase, but regular rate of pay and hours fall.

*Type 4: Workers with regular OT who remain exempt (*i.e.*, earnings increase to the updated salary level).

At the new standard salary level, the average weekly earnings of all affected workers is expected to increase from $733.65 to $739.13, a change of $5.48 (0.7 percent). However, these figures mask the impact on workers whose hours and earnings will change because Type 1 workers, who do not work overtime, make up more than 60 percent of the pool of affected workers. If Type 1 workers are excluded, the average increase in weekly earnings is $13.91 (1.9 percent). Multiplying the average change of $5.48 by the 4.2 million affected standard EAP workers equals an increase in earnings of $22.8 million per week or $1,187 million in the first year (Table 23). Of the weekly total, $660,000 is due to the minimum wage provision and $22.2 million stems from the overtime pay provision.

For workers affected by the change in the HCE compensation level, average weekly earnings increase by $29.19 ($57.57 if Type 1 workers, who do not work overtime, are excluded). When multiplied by 65,000 affected workers, the national increase in weekly earnings is $1.9 million per week, or $98.5 million in the first year. Thus, total Year 1 transfer payments attributable to this Final Rule total $1,285.2 million.

TABLE 23—TOTAL CHANGE IN WEEKLY AND ANNUAL EARNINGS FOR AFFECTED EAP WORKERS BY PROVISION, FY2017

Provision	Total change in earnings (1,000s)	
	Weekly	Annual
Total [a]	$24,715	$1,285,162
Standard salary level:.		
Total	22,820	1,186,646
Minimum wage only	660	34,338
Overtime pay only [b]	22,160	1,152,308
HCE compensation level:.		
Total	1,895	98,515
Minimum wage only.		
Overtime pay only [b]	1,895	98,515

[a] Due to both the minimum wage and overtime pay provisions and changes in both the standard salary level and the HCE compensation level.

[b] Estimated by subtracting the minimum wage transfer from the total transfer.

4. Potential Transfers Not Quantified

There may be additional transfers attributable to this Final Rule; however, the magnitude of these other transfers could not be quantified.

Reduced Earnings for Some Workers

Holding regular rate of pay and work hours constant, payment of an overtime premium will increase weekly earnings for workers who work overtime. However, as discussed previously, employers may try to mitigate cost increases by reducing the number of overtime hours worked, either by transferring these hours to other workers or monitoring hours more closely. Depending on how hours are adjusted, a specific worker may earn less pay after this Final Rule. For example, assume an exempt worker is paid for overtime hours at his regular rate of pay (not paid the overtime premium but still acquires a benefit from each additional hour worked over 40 in a week). If the employer does not raise the worker's salary to the new level, requiring the overtime premium may cause the employer to reduce the worker's hours to 40 per week. If the worker's regular rate of pay does not increase, the worker will earn less due to the lost hours of work.

Additional Work for Some Workers

Affected workers who remain exempt will see an increase in pay but may also see an increase in workload as Emerge Center and other commenters noted. The Department estimated the net changes in hours, but as noted in section VI.D.iv.3, subpart Modeling Changes in Wages and Hours, did not estimate changes in hours for affected workers whose earnings increase (perhaps most notably those whose salary is increased to the new threshold so they remain overtime exempt).

Reduction in Bonuses and Benefits

Some commenters stated that employers may offset increased labor costs by reducing bonuses or benefits.[211] *See, e.g.,* Greater Philadelphia Chamber of Commerce; Kentucky Society of CPAs; Michigan Association of Certified Public Accountants; Rockingham County, North Carolina. AGC stated that 40 percent of the members it surveyed expected affected employees to lose some fringe benefits. Other commenters, such as AIA–PCI, stated that employers would reduce bonus and incentive pay to newly overtime-eligible workers, offsetting some of the earnings gains achieved through overtime pay. NAHB presented results from a survey conducted of members concerning overtime of construction supervisors, and stated that of the 33 percent of companies indicating that a change in company policies, with respect to construction supervisors, would occur, 55 percent reported they would "reduce or eliminate bonuses" and 33 percent indicated they would "reduce or eliminate other benefits." This results in approximately 18 percent of respondents predicting reduced bonuses and 11 percent predicting reduced benefits.

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[211] Other commenters asserted that some newly overtime-eligible employees will lose benefits that their employers tie to exempt status. *See, e.g.,* CUPA–HR; National Association of Electrical Distributors; WorldatWork. As the Department explained in section IV.A.iv., we see no compelling reason why employers cannot change their compensation plans to provide such fringe benefits and bonus payments based upon, for example, the employees' job titles rather than based upon their exemption status.

Commenters did not provide any data from which to estimate the potential magnitude of changes to benefits or bonuses. Therefore, the Department has not incorporated these impacts into the cost and transfer estimates. Furthermore, the Department believes if employers reduce benefits or bonuses, those reductions will occur instead of the full employer adjustments included in the model; that is, an employer who reduces benefits or bonuses is likely to reduce base wages by a smaller amount. The labor market will constrain to some extent employers' ability to reduce labor costs, regardless of the types of compensation they use to achieve those reductions.

v. Sensitivity Analysis

This section includes estimated costs and transfers using either different assumptions or segments of the population. First, the Department presents bounds on transfer payments estimated using alternative assumptions. Second, in response to commenter concerns that the rulemaking would have a disproportionate impact on low-wage regions and industries, the Department considers costs and transfers by region and by industry.

1. Bounds on Transfer Payments

Because the Department cannot predict employers' precise reaction to the Final Rule, the Department calculated bounds on the size of the estimated transfers from employers to workers using a variety of assumptions. Since transfer payments are the largest component of this Final Rule, the scenarios considered here are bounds around the transfer estimate. Based on the assumptions made, these bounds do not generate bounded estimates for costs or DWL.

The potential upper limit for transfers occurs with the assumption that the demand for labor is completely inelastic, and therefore neither the implicit regular hourly rate of pay nor hours worked adjust in response to the changes in the EAP standard salary level and HCE annual compensation level. Under this assumption, employers pay workers one and a half times their current implicit hourly rate of pay for all overtime hours currently worked (*i.e.,* the full overtime premium). The potential lower bound occurs when wages adjust completely and weekly earnings are unchanged as predicted by the employment contract model. The Department believes that both the upper bound scenario and the lower bound scenario are unrealistic; therefore, we constructed more credible bounds.

For a more realistic upper bound on transfer payments, the Department assumed that all occasional overtime workers and half of regular overtime workers would receive the full overtime premium (*i.e.,* such workers would work the same number of hours but be paid 1.5 times their implicit initial hourly wage for all overtime hours). Conversely, in the preferred model the Department assumed that only 50 percent of occasional overtime workers and no regular overtime workers would receive the full overtime premium. For the other half of regular overtime workers, the Department assumed in the upper bound method that they would have their implicit hourly wage adjusted as predicted by the partial employment contract model (wage rates fall and hours are reduced but total earnings continue to increase, as in the preferred method). Table 24 summarizes the assumptions described above.

The plausible lower transfer bound also depends on whether employees work regular overtime or occasional overtime. For those who regularly work overtime hours and half of those who work occasional overtime, the Department assumes the employees' wages will fully adjust as predicted by the employment contract model (in the preferred method their wages adjust based on the partial employment contract model).[212] For the other half of employees with occasional overtime hours, the lower bound assumes they will be paid one and one-half times their implicit hourly wage for overtime hours worked (full overtime premium).

TABLE 24—SUMMARY OF THE ASSUMPTIONS USED TO CALCULATE THE LOWER ESTIMATE, PREFERRED ESTIMATE, AND UPPER ESTIMATE OF TRANSFERS

Lower transfer estimate	Preferred estimate	Upper transfer estimate
	Occasional Overtime Workers (Type 2)	
50% full EC model adj 50% full overtime premium	50% partial EC model adj 50% full overtime premium.	100% full overtime premium.
	Regular Overtime Workers (Type 3)	
100% full EC model adj	100% partial EC model adj	50% partial EC model adj. 50% full overtime premium.

* Full overtime premium: Regular rate of pay equals the implicit hourly wage prior to the regulation (with no adjustments); workers are paid 1.5 times this base wage for the same number of overtime hours worked prior to the regulation.

* Full employment contract (EC) model: Base wages are set at the higher of: (1) A rate such that total earnings and hours remain the same before and after the regulation; thus the base wage falls, and workers are paid 1.5 times the new base wage for overtime hours (the employment contract model) or (2) the minimum wage.

* Partial employment contract model: Regular rates of pay are partially adjusted to the wage implied by the employment contract model. The resulting regular rate of pay is the midpoint of: (1) A base wage that adjusts 40 percent of the way to the employment contract model wage level, assuming no overtime premium was initially paid and (2) a base wage that adjusts 80 percent of the way to the employment contract model wage level, assuming the workers initially received a 28 percent premium for overtime hours worked.

The cost and transfer payment estimates associated with the bounds are presented in Table 25. Regulatory familiarization costs and adjustment costs do not vary across the scenarios. These employer costs are a function of the number of affected firms or affected workers, human resource personnel hourly wages, and time estimates. None of these vary based on the assumptions made above. Conversely, managerial costs are lower under these alternative employer response assumptions because fewer workers' hours are adjusted by employers and thus managerial costs, which depend in part on the number of workers whose hours change, will be smaller.[213] Depending on how employers adjust the implicit regular hourly wage, estimated transfers may range from $487.5 million to $2,525.3 million, with the preferred estimate equal to $1,285.2 million.

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[212] The straight-time wage adjusts to a level that keeps weekly earnings constant when overtime hours are paid at 1.5 times the straight-time wage. In cases where adjusting the straight-time wage results in a wage less than the minimum wage, the straight-time wage is set to the minimum wage.

TABLE 25—BOUNDS ON YEAR 1 COST AND TRANSFER PAYMENT ESTIMATES, FY 2017

[Millions]

Cost/transfer	Lower transfer estimate	Preferred estimate	Upper transfer estimate
Direct employer costs:			
Reg. familiarization	$272.5	$272.5	$272.5
Adjustment costs	191.4	191.4	191.4
Managerial costs	0.0	214.0	62.4
Total direct employer costs	463.9	677.9	526.2
Transfers	487.5	1,285.2	2,525.3

Note 1: Pooled data for FY2013–FY2015 projected to reflect FY2017.

Note 2: Estimates due to both the minimum wage and overtime pay provisions and changes in both the standard salary level and the HCE compensation level.

2. Impacts by Regions and Industries

In response to commenter concerns that the proposed standard salary level would disproportionately impact low-wage regions and low-wage industries, and requests for additional information on impacts by region and/or industry, this section presents estimates of the impacts of this Final Rule by region and by industry (*see* section IV.A.iv.).

PPWO asserted that the Department's probability codes demonstrate that the proposed salary level will disproportionately impact low-wage regions and industries. Specifically, PPWO cited a study that found 100 percent of first-line supervisors of food preparation and serving workers in Mississippi would fall below the new threshold, even though the Department's probability codes state that 10 to 50 percent of employees in this occupation should pass the duties test. The Department estimated based on CPS data for FY2013–FY2015 that about 20 percent of first-line supervisors of food preparation and serving workers in Mississippi in this industry will exceed the Final Rule salary threshold, while only 10 to 50 percent will pass the duties test, which shows the change in the Final Rule mitigates the impact on low-wage regions and industries. Similarly, the National Association of Home Builders (NAHB) analyzed state-level data and found that 50 percent or more of first line construction supervisors in Arkansas, Mississippi, New Mexico, and Tennessee would be affected by the Department's proposal. However, 55 percent of first line supervisors of construction trades and extraction workers in the South earn above the Final Rule's salary threshold, even though only 0 to 10 percent of such workers nationwide are likely to pass the standard duties test. Finally, the National Restaurant Association (NRA) noted, based on a 2014 study, that the median base salary paid to restaurant managers is $47,000 and to crew and shift supervisors is $38,000. As revised, the standard salary level in this Final Rule is approximately equivalent to the 2014 median base salary paid to restaurant managers cited by NRA.

The Department analyzed impacts to low wage regions by comparing the number of affected workers, costs, and transfers across the four Census Regions. The region with the most affected workers is the South (1.7 million). However, as a share of potentially affected workers in the region, the South is not unduly affected relative to other regions (22 percent are affected compared with 16 to 19 percent in other regions); as a share of all workers in the region, the South is also not unduly affected relative to other regions (3.6 percent are affected compared with 2.7 to 3.2 percent in other regions).

TABLE 26—POTENTIALLY AFFECTED AND AFFECTED WORKERS, BY REGION, FY2017

Region	Workers subject to FLSA (millions)	Potentially affected workers (millions)[a]	Affected workers			
			Number (millions)[b]	Percent of total affected	Percent of potentially affected workers in region	Percent of all workers in region
All	132.8	22.5	4.2	100	18.8	3.2
Northeast	24.8	4.8	0.8	18.6	16.4	3.2
Midwest	29.5	4.7	0.9	20.8	18.6	3.0
South	48.2	7.8	1.7	41.1	22.2	3.6
West	30.2	5.1	0.8	19.5	16.0	2.7

Note: Pooled data for FY2013–FY2015 projected to reflect FY2017.

[a] Potentially affected workers are EAP exempt workers who are white collar, salaried, not eligible for another (non-EAP) overtime exemption, and not in a named occupation.

[b] Estimated number of workers exempt under the EAP exemptions who would be entitled to overtime protection under the updated salary levels (if their weekly earnings do not increase to the new salary levels).

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[213] In the lower transfer estimate, managerial costs are zero because hours do not change for any Type 2 or Type 3 workers.

Total transfers in the first year were estimated to be $1.3 billion (Table 27). As expected, the transfers in the South are the largest portion because the largest number of affected workers is employed in the South. Transfers in the South were estimated to be about 36.5 percent of all transfers, while the South composes 41.1 percent of all affected workers (*see* section VI.D.ii.), thus, transfers per affected workers are somewhat below average in the South. Annual transfers per worker are $270 in the South and range from $242 to $378 in other regions. Excluding Type 1 workers, whose hours do not change, annual transfers per worker are $699 in the South and range from $664 to $1,004 in other regions.

TABLE 27—TRANSFERS BY REGION, FY2017

Region	Total change in earnings (millions) [a]	Percent of total	Per affected worker
Total	$1,285.2	100	$304.00
Northeast	189.9	14.8	241.86
Midwest	314.7	24.5	357.13
South	469.3	36.5	269.96
West	311.3	24.2	378.28

Note: Pooled data for FY2013–FY2015 projected to reflect FY2017.

[a] Due to both the minimum wage and overtime pay provisions and changes in both the standard salary level and the HCE compensation level.

Direct employer costs are composed of regulatory familiarization costs, adjustment costs, and management costs. Total first year direct employer costs were estimated to be $677.9 million (Table 28). Total direct employer costs were estimated to be the highest in the South ($259.6 million) and lowest in the Northeast ($123.0 million). While the three components of direct employer costs vary as a percent of these total costs by region, the percentage of total direct costs in each region is fairly consistent with the share of all workers in a region. Direct employer costs in each region as a percentage of the total direct costs were estimated to be 18.1 percent in the Northeast, 22.7 percent in the Midwest, 38.3 percent in the South, and 20.9 percent in the West. Once again, these proportions are almost the same as the proportions of the total workforce in each region: 18.5 percent in the Northeast, 22.0 percent in the Midwest, 36.7 percent in the South, and 22.8 percent in the West.

TABLE 28—DIRECT EMPLOYER COSTS BY REGION, FY2017

Direct employer costs [a]	All regions	Northeast	Midwest	South	West
Costs (Millions)					
Regulatory familiarization	$272.5	$52.6	$59.9	$95.7	$64.3
Adjustment	191.4	35.6	39.9	78.7	37.3
Managerial	214.0	34.9	54.1	85.1	39.9
Total direct costs	677.9	123.0	153.9	259.6	141.5
Percent of Total Costs by Region					
Regulatory familiarization	100	19.3	22.0	35.1	23.6
Adjustment	100	18.6	20.8	41.1	19.5
Managerial	100	16.3	25.3	39.8	18.7
Total direct costs	100	18.1	22.7	38.3	20.9

Note: Pooled data for FY2013–FY2015 projected to reflect FY2017.

[a] All costs include both standard salary level costs and HCE compensation level costs.

Another way to compare the relative impacts of this Final Rule by region is to consider the transfers and costs as a proportion of current payroll and current revenues (Table 29). Nationally, direct employer costs are 0.010 percent of payroll. By region, direct employer costs as a percent of payroll are also approximately the same (between 0.009 and 0.012 percent of payroll). Direct employer costs as a percent of revenue are 0.002 percent nationally and in each region.

Transfers as a percent of payroll show greater variation among the regions than costs, but the levels are still very low. Transfers as a percent of payroll range from 0.013 percent in the Northeast to 0.023 percent in the Midwest. As a percent of revenue, transfers range from 0.003 to 0.004 percent. Thus, although there are some slight differences among regions, costs and transfers relative to either current payroll or revenue are less than a tenth of one percent. It is unlikely that a difference of 0.012 percent in costs and transfers as a percentage of payroll between the Northeast (0.022 percent—the lowest percentage) and the Midwest (0.034 percent—the highest percentage) would create any significant regional competitive advantage.

Several commenters expressed concern that this rulemaking will be more costly in low-wage regions due to lower revenue; for example, an individual commenter wrote "a restaurant in NYC taking in a million or more per year may not have any problem paying their manager or managers this proposed minimum salary. However a restaurant in a mid-west town that does say half that or 500,000 in sales, simply cannot afford such a salary." Similarly, the National Funeral Directors Association asserted the rule will "be much more disruptive for funeral homes in smaller rural communities where many of those family-owned businesses are already wrestling with lower revenue levels.''

However, regional comparisons must incorporate more than a comparison of a single occupation: while revenues of a typical restaurant in NYC are higher than a typical restaurant in Milwaukee, so are costs including managers' salaries, other employees' wages, food costs and overhead, thus the relative ability of the NYC restaurant to increase managers' salaries might be more apparent than real. In addition, the Department has noted in our analysis that employers will adjust employees' earnings and hours to reduce the impact of the rule beyond the simple calculation of multiplying the overtime premium by the number of overtime hours worked. For example, in Table 22, the Department indicates that on average Type 3 workers will receive a less than three percent increase in weekly earnings. In the restaurant scenario described, this small increase in earnings applies to a fraction of the restaurant's labor force, which in itself is a fraction of total costs and revenues. Therefore, based on the above analysis, the Department does not believe low-wage regions will be unduly affected.

TABLE 29—ANNUAL TRANSFERS AND COSTS AS PERCENTS OF PAYROLL AND OF REVENUE BY REGION, FY2017

Region	Payroll (billions)	Revenue (billions)	Direct employer costs		Transfers	
			As percent of payroll	As percent of revenue	As percent of payroll	As percent of revenue
Total	$6,524	$37,261	0.010%	0.002%	0.020%	0.003%
Northeast	1,440	7,492	0.009	0.002	0.013	0.003
Midwest	1,393	8,503	0.011	0.002	0.023	0.004
South	2,171	13,362	0.012	0.002	0.022	0.004
West	1,520	7,905	0.009	0.002	0.020	0.004

Notes: Pooled data for FY2013–FY2015 projected to reflect FY2017. Payroll, revenue, costs, and transfers all exclude the federal government.
Sources: Private sector payroll and revenue data from 2012 Economic Census. State and local payroll data from 2014 Annual Survey of Public Employment and Payroll. State and local revenue data from 2012 Census of Governments.

In order to gauge the impact of the final rule on industries, the Department compared estimates of combined direct costs and transfers as a percent of payroll, profits, and revenue, for the 13 major industry groups (Table 30).[214] This provides a common method of assessing the relative impacts of the rule on different industries, and the magnitude of adjustments the rule may require on the part of enterprises in each industry. The relative costs and transfers expressed as a percentage of payroll are particularly useful measures of the relative size of adjustment faced by organizations in an industry because they benchmark against the cost category directly associated with the labor force. Measured in these terms, costs and transfers as a percent of payroll are highest in agriculture, other services, and leisure and hospitality. However, the overall magnitude of the relative shares are small, representing less than 0.1 percent of overall payroll costs across industries. The differences between industries are also small, with the range of values of total costs and transfers as a percent of payroll ranging from a low of .01 percent (public administration) to a high of 0.09 percent (agriculture).

The Department also estimates transfers and costs as a percent of profits.[215] [216] Benchmarking against profits is potentially helpful in the sense that it provides a measure of the Final Rule's effect against returns to investment. However, this metric must be interpreted carefully as it does not account for differences across industries in risk-adjusted rates of return which are not readily available for this analysis. The ratio of costs and transfers to profits also does not reflect differences in the firm-level adjustment to profits impacts reflecting cross-industry variation in market structure.[217] Nonetheless, the overall magnitude of costs and transfers as a percentage of profits are small, representing in all industries except one (transportation and utilities) less than 1.0 percent of overall profits. The differences between industries are also small, with the range of values of total costs and transfers as a percent of profits ranging from a low of .04 percent (financial activities) to a high of 1.46 percent (transportation and utilities).

Finally, the Department's estimates of transfers and costs as a percent of revenue by industry also indicate very small impacts (Table 30). The industries with the largest costs and transfers as a percent of revenue are leisure and hospitality and other services. However, the difference between the leisure and hospitality industry, the industry with the highest costs and transfers as a percent of revenue, and the industry with the lowest costs and transfers as a percent of revenue (public administration) is 0.02 percentage points. Table 30 illustrates that the actual differences in costs relative to revenues are quite small across industry groupings.

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[214] Note that the totals in this table for transfers and direct costs do not match the totals in other sections due to the exclusion of transfers to federal workers and costs to federal entities. Federal costs and transfers are excluded to be consistent with payroll and revenue which exclude the federal government.

[215] Internal Revenue Service. (2012). Corporation Income Tax Returns. Available at: *https://www.irs.gov/pub/irs-soi/12coccr.pdf.*

[216] Table 1 of the IRS report provides information on total receipts, net income, and deficits. The Department calculated the ratio of net income (column (7)) less any deficit (column (8)) to total receipts (column (3)) for all firms by major industry categories. Costs and transfers as a percent of revenues were divided by the profit to receipts ratios to calculate the costs and transfers as a percent of profit.

[217] In particular, a basic model of competitive product markets would predict that highly competitive industries with lower rates of return would adjust to increases in the marginal cost of labor arising from the rule through an overall, industry-level increase in prices and a reduction in quantity demanded based on the relative elasticities of supply and demand. Alternatively, more concentrated markets with higher rates of return would be more likely to adjust through some combination of price increases and profit reductions based on elasticities as well as interfirm pricing responses.

TABLE 30—ANNUAL TRANSFERS, TOTAL COSTS, AND TRANSFERS AND COSTS AS PERCENT OF PAYROLL, REVENUE, AND PROFIT BY INDUSTRY, FY2017

Industry	Transfers (millions)	Direct costs (millions)	Costs and transfers		
			As percent of payroll	As percent of revenue	As percent of profit[a]
All	$1,282.70	$676.70	0.03%	0.01%	0.09%
Agriculture, forestry, fishing, & hunting	4.10	1.40	0.09	0.02	0.34
Mining	11.90	3.50	0.02	0.00	0.08
Construction	50.20	36.60	0.03	0.01	0.21
Manufacturing	125.60	46.00	0.03	0.00	0.05
Wholesale & retail trade	248.50	117.60	0.05	0.00	0.09
Transportation & utilities	44.50	21.80	0.03	0.01	1.46
Information	48.90	21.80	0.03	0.01	0.08
Financial activities	134.90	79.60	0.03	0.01	0.04
Professional & business services	181.50	113.30	0.02	0.01	0.14
Education & health services	183.70	114.80	0.03	0.01	0.21
Leisure & hospitality	142.60	57.40	0.07	0.02	0.40
Other services	71.60	45.20	0.08	0.02	0.46
Public administration	34.80	17.70	0.01	0.00	[b]

Sources: Private sector payroll and revenue data from 2012 Economic Census. State and local payroll data from 2014 Annual Survey of Public Employment and Payroll. State and local revenue data from 2012 Census of Governments. Profit to revenue ratios calculated from 2012 Internal Revenue Service Corporation Income Tax Returns.

[a] Profit data based on corporations only.

[b] Profit is not applicable for public administration.

Although labor market conditions vary by Census Region and industry, the impacts from updating the standard salary level and the HCE compensation level do not unduly affect any of the regions or industries. The proportion of total costs and transfers in each region is fairly consistent with the proportion of total workers in each region. Additionally, the estimated costs and transfers from this Final Rule are very small relative to current payroll or current revenue—less than a tenth of a percent of payroll and less than three-hundredths of a percent of revenue in each region and in each industry.

vi. Deadweight Loss

Deadweight loss (DWL) occurs when a market operates at less than optimal equilibrium output. This typically results from an intervention that sets, in the case of a labor market, wages above their equilibrium level. While the higher wage results in transfers from employers to workers, it also often causes a decrease in the total number of labor hours that are being purchased on the market. DWL is a function of the difference between the wage employers were willing to pay for the hours lost and the wage workers were willing to take for those hours. In other words, DWL represents the total loss in economic surplus resulting from a "wedge" between the employer's willingness to pay and the worker's willingness to accept. DWL may vary in magnitude depending on market parameters, but is typically small when wage changes are small or when labor supply and labor demand are relatively price (wage) inelastic. The estimate of DWL assumes the market meets the theoretical conditions for an efficient market in the absence of this intervention (*e.g.,* all conditions of a perfectly competitive market hold: full information, no barriers to entry, etc.). Since labor markets are generally not perfectly competitive, the Department's estimate of DWL is likely an overestimate.

The DWL resulting from this Final Rule was estimated based on the average decrease in hours worked and increase in hourly wages calculated in section VI.D.iv. As the cost of labor rises due to the requirement to pay the overtime premium, the demand for overtime hours decreases, which results in fewer hours of overtime worked. To calculate the DWL, the following values must be estimated:

- The increase in average hourly wages for affected EAP workers (holding hours constant),
- the decrease in average hours per worker, and
- the number of affected EAP workers.

Only 50 percent of Type 2 workers with overtime hours worked in the survey week (those who work regular or predictable occasional overtime) and Type 3 workers are included in the DWL calculation because the other workers either do not work overtime (Type 1), continue to work the same number of overtime hours (Type 4), or their employers are unable to adjust their hourly wage because their overtime hours worked are unpredictable (the other 50 percent of Type 2 workers). As described above, after taking into account a variety of potential responses by employers, the Department estimated the average wage change for affected EAP workers whose hours change. Workers impacted by the change in the standard salary level are considered separately from workers impacted by the change in the HCE compensation level.

For workers affected by the revised standard salary level, and who experience a change in hours, average wages (including overtime) will increase by $0.69 per hour prior to employer hour adjustments (Table 31). This represents the size of the wedge between labor supply and labor demand. Average hours will fall by 0.40 per week. These changes result in an average DWL of $0.14 per week per Type 2 (the 50 percent of CPS occasional overtime workers who work foreseeable overtime) and Type 3 worker. An estimated 803,500 workers will be eligible for the overtime premium on some of their hours worked each week after employer adjustments are taken into account. Multiplying the $0.14 per worker per week estimate by the number of affected workers results in a total DWL of $5.8 million in the first year of this Final Rule attributable to the revised standard salary level (803,500 workers in DWL analysis × $0.14 per worker per week × 52 weeks).

For workers affected by the revised HCE compensation level and who experience a change in hours, the average hourly wage will increase by $2.01 and average hours worked will fall by 0.37 per week. This results in an average DWL of $0.38 per week for each of the estimated 31,200 workers affected by the compensation level who will see their hours fall. Multiplying this per worker estimate by the number of affected workers results in a DWL of $610,000 in the first year attributable to the HCE component of this Final Rule (31,200 workers in DWL analysis × $0.38 per worker × 52 weeks). Thus, total DWL is estimated to be $6.4 million in Year 1, which is small in comparison to the size of the costs and transfers associated with this proposal.[218]

TABLE 31—SUMMARY OF DEADWEIGHT LOSS COMPONENT VALUES IN YEAR 1

Component	Standard salary level	HCE Compensation level
Average hourly wages (holding hours constant)		
Pre	$14.86	$42.84
Post	$15.55	$44.85
Change	$0.69	$2.01
Average overtime hours		
Pre	10.60	12.03
Post	10.20	11.65
Change	−0.40	−0.37
Affected EAP workers	803,476	31,225
DWL		
DWL per worker per week	$0.14	$0.38
Total annual DWL (millions)	$5.78	$0.61

Note: DWL analysis is limited to workers who experience hour adjustments in the reference week (50 percent of Type 2 workers identified in the CPS and Type 3).

Some commenters expressed concern that the rulemaking will lead to a reduction in employment or an increase in unemployment. For example, the National Newspaper Association stated that 41 percent of surveyed members said the proposal would "lead to an overall loss of jobs in the community," and AGC reported 33 percent of surveyed members "expect some positions to be eliminated." *See also* Erie Sport Store; Michigan Federation for Children and Families; Texas Society of CPAs; Virginia Veterinary Medical Association. One small business owner wrote: "If I find that I am forced to pay additional money to my existing staff . . . [m]y current employees will continue to work unwanted hours while another person continues to be unemployed." The Department acknowledges that by increasing the cost of labor, the total number of labor hours demanded is expected to fall. However, the Department has estimated the net decrease in labor hours to be small (334,000 hours per week in Year 1). We expect this reduction in hours to be largest for affected workers who presently work a significant amount of overtime and who will become nonexempt. We believe that most of the reduction in these employees' hours due to the increased marginal cost of their labor will be offset by increased hours for other workers. This may be in the form of hiring of additional staff or increased hours for part-time or exempt employees. By increasing the marginal cost of labor for newly overtime-eligible workers, employers have an incentive to avoid overtime hours worked by newly overtime-eligible workers, spreading work to other employees (which may increase employment), or making other production-related decisions. These effects may offset DWL, and, as discussed later, may affect social welfare. However, we do not attempt to quantify those effects here.

If firms increase workers' pay to meet the new salary level, rather than paying overtime, however, then we may see these particular workers working longer hours to justify their increase in pay. This could consequently limit the spread of employment that is traditionally recognized as a goal of overtime laws. The Department acknowledges this may occur in some instances, however, we do not attempt to estimate transfers between workers due to uncertainty concerning the prevalence and magnitude of such transfers.

vii. Benefits and Effects Not Discussed Elsewhere

In general, benefits of the rulemaking were not quantified due to data limitations. However, these benefits are discussed qualitatively.

Market inefficiencies may be reflected in employees' choices concerning earnings and hours worked. These inefficiencies may result from the presence of information asymmetries,[219] labor market immobility, and other forms of labor market imperfection that lead to outcomes that differ from models that assume competitive labor markets. For example, empirical research by Wozniak and others[220] indicate that a variety of factors (*e.g.*, educational endowment, exposure to local economic shocks early in work history, and lower earnings) are associated with less effective job search networks and lower labor market mobility. These may arise from a variety of sources, such as less sophistication in eliciting outside offers or less effective search heuristics. Salaried workers at the lower end of the compensation scale are more vulnerable to these inefficiencies than those at the higher end. Such workers are also more likely to be functioning in those parts of the labor market more impacted by trade, technological change, and other factors that may lead to a greater number of job seekers than job vacancies. Given these well documented market imperfections, tailored government intervention can result in social benefits. In a frictionless labor market, we would expect workers to find jobs where, at the margin, their compensation is equivalent to the value of their leisure time. However, labor market frictions of the sort discussed above diminish mobility and therefore lead to suboptimal outcomes for overtime exempt workers with few outside options, specifically, in them having excessive hours of work. In the presence of labor market friction, tailored government intervention can make these workers better off from a social welfare perspective.

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[218] Very few commenters addressed the Department's DWL calculation in the NPRM. The FL DEO derived their own estimate for deadweight loss in Florida, which if applied nationally would be significantly larger than the Department's DWL estimate. However, FL DEO did not explain how they arrived at their estimate, nor did they note any specific problems with our calculation. Therefore, the Department has not adjusted our DWL calculations. Additionally, FL DEO's concern that the Department's DWL estimate is too low because it is "only $1.58 per worker, per year" divides the DWL costs across all affected workers. If instead these costs are spread across only those workers whose hours or wages change, the cost per worker is larger.

[219] Stiglitz, Joseph E. (2000) "The Contributions of the Economics of Information to Twentieth Century Economics", *Quarterly Journal of Economics* 115 (4): 1441–1478.

[220] Wozniak, Abigail (2010) "Are College Graduates More Responsive to Distant Labor Market Opportunities?" *Journal of Human Resources* 45(3): 994–970. Bound, John and Harry Holzer (200) "Demand Shifts, Population Adjustments, and Labor Market Outcomes during the 1980s" *Journal of Labor Economics* 18(1): 20–54. Greenwoods, Michael, J (1997) "Internal Migration in Developed Countries" in *Handbook of Population and Family Economics*, ed Mark Rosenzweig and Oded Stark. New York: Elsevier Science.

1. Strengthening Overtime Protection for Other Workers

In addition to the 4.2 million affected EAP workers who will be newly eligible for overtime protection (absent employer response to increase the salary level to retain the exemption), overtime protection will be strengthened for an additional 8.9 million salaried workers who earn between the current salary level of $455 per week and the updated salary level of $913 per week. These workers, who were previously vulnerable to misclassification through misapplication of the duties test, will now be automatically overtime protected because their salaries fall below the new salary level and therefore they will not be subject to the duties test. These 8.9 million workers include:

- 5.7 million salaried white collar workers who are at particular risk of being misclassified because they currently pass the salary level test but do not satisfy the duties test; and
- 3.2 million salaried workers in blue collar occupations whose overtime protection will be strengthened because their salary will fall below the new salary threshold.[221] (Identification of blue collar workers is explained in section VI.B.iv).

Although these workers are currently entitled to minimum wage and overtime protection, their protection is better assured with the updated salary level. The salary level test is considered a bright-line test because it is immediately clear to employers and employees alike whether or not a worker passes the salary threshold. The duties test (which is the reason employers cannot currently claim the EAP exemption for the above workers) is more subjective and therefore harder to apply. An outdated salary level reduces the effectiveness of this bright-line test. At the new salary level, the number of overtime-eligible white collar salaried workers earning at or above the salary level will decrease by 5.7 million, and if we use our estimate of misclassification of 12.8 percent, then an estimated 732,000 of these workers are currently entitled to overtime protection but their employers do not recognize them as such. Therefore, increasing the salary level is expected to result in less worker misclassification. These reductions will have the greatest impact on workers concentrated in certain occupations and industries as shown in Table 10. Employers will be able to more readily determine their legal obligations and comply with the law. The resulting effects, although unquantified, would be categorized into costs (*e.g.,* increased managerial effort), transfers (*e.g.,* increased payments from employers to workers) and benefits in the same manner as effects are categorized in the analysis of EAP workers who will be newly eligible for overtime protection.

2. Reduction in Litigation

Reducing the number of white collar employees for whom a duties analysis must be performed in order to determine entitlement to overtime will also reduce some types of litigation related to the EAP exemption. As previously discussed, employer uncertainty about which workers should be classified as EAP exempt has contributed to a sharp increase in FLSA lawsuits over the past decade. Much of this litigation has involved whether employees who satisfy the salary level test also meet the duties test for exemption. *See, e.g, Soehnle* v. *Hess Corp.,* 399 F. App'x 749 (3d Cir. 2010) (gas station manager earning approximately $654 per week satisfied duties test for executive employee); *Morgan* v. *Family Dollar Stores, Inc.,* 551 F.3d 1233 (11th Cir. 2008) (store managers earning an average weekly salary of up to $706 did not satisfy duties test for executive exemption).

Setting an appropriate salary level for the standard duties test, and maintaining the salary level with automatic updates, will restore the test's effectiveness as a bright-line method for separating overtime-protected workers from those who may be bona fide EAP workers, and in turn decrease the litigation risk created when employers must apply the duties test to employees who generally are not performing bona fide EAP work. This will vastly reduce legal challenges regarding the duties test for employees earning between the current salary level ($455) and the updated level ($913). *See, e.g., Little* v. *Belle Tire Distribs., Inc.,* 588 F. App'x 424 (6th Cir. 2014) (applicability of administrative or executive exemption to tire store assistant manager earning $1,100 semi-monthly); *Taylor* v. *Autozone, Inc.,* 572 F. App'x 515 (9th Cir. 2014) (applicability of executive exemption to store managers earning as little as $800 per week); *Diaz* v. *Team Oney, Inc.,* 291 F. App'x. 947 (11th Cir. 2008) (applicability of executive duties test to pizza restaurant assistant manager earning $525 per week). Setting the salary level test at the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region ($913) will alleviate the need for employers to apply the duties test in these types of cases, which is expected to result in decreased litigation as employers will be able to determine employee exemption status through application of the salary level test without the need to perform a duties analysis. *See* Weiss Report at 8 (explaining that the salary tests "have amply proved their effectiveness in preventing the misclassification by employers of obviously nonexempt employees, thus tending to reduce litigation. They have simplified enforcement by providing a ready method of screening out the obviously nonexempt employees, making an analysis of duties in such cases unnecessary.")

The International Association of Fire Fighters (IAFF) concurred, stating that "reducing the number of employees for whom the duties test must be applied will significantly reduce litigation related to the EAP exemption." Other commenters agreed that the proposed rule would make the exemption easier to apply, resulting in savings as a result of reduced litigation. *See* Comment from 57 labor law professors; American Federation of State, County and Municipal Employees; NELP. Another attorney, commenting on his own, similarly stated that the rule would reduce the potential for the misclassification of employees that often leads to litigation.[222]

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[221] Some workers in this group may be overtime exempt due to another non-EAP exemption.

[222] Some commenters, including the National Association of Manufacturers and Jackson Lewis, expressed concern that the rulemaking will increase rather than decrease litigation costs because there will be a "spike in employees who were unhappy about being reclassified" and disputes about issues such as what is compensable time, the accuracy of time records, and compliance with rest/meal period requirements. *See also* Wage and Hour Defense

The size of the potential social benefits from reducing litigation can be illuminated with the following estimation method. The Department estimated the share of FLSA cases that could potentially be avoided due to the revised salary levels. The Department used data from the U.S. Court's Public Access to Court Electronic Records (PACER) system and the CPS to estimate the percent of FLSA cases that concern EAP exemptions and are likely to be affected by the final rule and data from a published study of the cost of civil litigation to determine the potential benefits of reduced litigation arising from the final rule.

In order to determine the potential number of cases that would be affected by the Final Rule, the Department obtained a list of all FLSA cases closed in 2014 from PACER (8,256 cases). From this list the Department selected a random sample of 500 cases. For each case in this sample, relevant information was reviewed and the Department identified the cases that were associated with the EAP exemption. The Department found that 12.0 percent of FLSA cases (60 of 500) were related to the EAP exemptions.[223] Next the Department determined what share of these cases could potentially be avoided by an increase in the standard salary level to $913 and an increase in the annual HCE compensation level to $134,004.

The Department estimated the share of EAP cases that may be avoided due to the Final Rule by using data on the salaried earnings distribution from the CPS to determine the share of potentially avoidable EAP cases where workers earn at least $455 but less than $913 per week or at least $100,000 but less than $134,004 annually. From CPS, the Department selected white collar, nonhourly workers as the appropriate reference group for defining the earnings distribution instead of exempt workers because of the simple fact that if a worker is litigating his or her exempt status, then we do not know if that worker is exempt or not. Based on this analysis, the Department determined that 35.8 percent of white collar nonhourly workers had earnings within these ranges. Applying these findings to the 12 percent of cases associated with the EAP exemption yields an estimated 4.3 percent of FLSA cases may be avoidable.[224] The assumption underlying this method is that workers who claim they are misclassified as EAP exempt have a similar earnings distribution as all white collar nonhourly workers.[225]

After estimating the share of cases that might be avoidable, the Department quantified the associated benefit regarding the cost of litigation. The Department drew on a recent study conducted by the Court Statistics Project.[226] The study provides estimates of the costs of litigation related to employment cases, based on time for the various steps of the litigation process (*e.g.*, case initiation, discovery, settlement, trial, etc.) and the costs of staff in providing these activities (*e.g.*, paralegals, junior and senior attorneys, etc.). It then provides quartile estimates (25th percentile, median, and 75th percentile) based on the survey data. The study finds that the median cost for employment litigation is $88,000. Applying this figure, the Department estimated avoided litigation costs resulting from the rule may total approximately $31.2 million per year.[227]

3. Uncertainty About Future Overtime Hours and Pay

This Final Rule may have an impact on newly overtime-protected employees who are not currently working much or any overtime, but who will now be entitled to minimum wage and overtime pay protections. These workers may face a lower risk of being asked to work overtime in the future, because they are now entitled to an overtime premium, which could reduce their uncertainty and improve their welfare if they do not desire to work overtime. Additionally, if they are asked to work overtime, they will be compensated for the inconvenience with an overtime premium.[228]

Economic theory suggests that workers tend to assign monetary values to risk or undesirable job characteristics, as evidenced by the presence of compensating wage differentials for undesirable jobs, relative to other jobs the worker can perform in the marketplace.[229] To the extent a compensating wage differential exists, compensation may decrease with the reduction in uncertainty.[230] For this reason, overall compensation would be expected to decrease for workers whose uncertainty decreases. Employees who prefer the reduced uncertainty to the wage premium would experience a net benefit of the rule, and employees who prefer the wage premium to the reduced uncertainty would experience a net detriment as a result of the rule. The Department believes that attempting to model the net monetary value of changes in uncertainty is not feasible due to its heavy reliance on data that are not readily available, and the potentially questionable nature of the resulting estimates.

4. Work-Life Balance

Due to the increase in marginal cost for overtime hours for newly overtime-eligible workers, employers will demand fewer hours from some of the workers affected by this rule.[231] The estimated transfer payment does not take into account the benefit to some workers of working fewer hours in exchange for more (or equal) pay. Therefore, an additional potential benefit of this Final Rule is the increase in time off for some affected EAP workers. On average, affected EAP workers were estimated to work 4.7 minutes less per week after the Final

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Institute. As a number of employee advocates commented, and as the Department explained in section IV.A.iv., we disagree with these employer commenters, and believe an increased salary level that will once again serve as a clear and efficient line of demarcation will reduce litigation.

[223] It was not always clear whether the case involved the EAP exemption; when uncertain the Department classified the case as not being related to the EAP exemption to produce a conservative estimate. For example, in cases with multiple allegations (including both EAP and non-EAP issues) the Department classified the case as not being related to the EAP exemption.

[224] If we use the pool of all exempt workers as the reference group, then 32.8 percent of salaried workers earn within these income ranges and an estimated 3.9 percent of FLSA cases may be avoidable (32.8 percent × 12 percent).

[225] There are several reasons why this assumption may not hold. First, workers with lower earnings are less likely to pass the duties test, and thus may be more likely to be misclassified. This may result in an underestimate of the share of cases associated with workers earning between $455 and $913. Conversely, workers with higher earnings may be more likely to bring a lawsuit because lawyers may be more likely to take the case. This may result in an overestimate of the share of cases associated with workers earning between $455 and $913.

[226] Hannaford-Agor, P. and Waters, N. L. (2013). Estimating the Cost of Civil Litigation. *Court Statistics Project,* 20(1), 1–8. Additional data on the distribution of litigation costs can be found at *www.ncsc.org/clcm.*

[227] The cost of litigation is estimated to be $53,680 if the case does not go to trial; according to Court Statistics Project, 39 percent of litigation costs are associated with trials ($88,000×(1 − 0.39)). Conversely, litigation costs might be significantly higher than estimated here since 25 percent of trial cases exceed costs of $210,800.

[228] Although this statement holds as a comparison between work hours below and above 40 per week, it is not universally valid as a comparison between the state of the world with the rule and the state of the world without the rule.

[229] For a discussion of compensating wage differentials, *see* Gronberg, T. J., & Reed, W. R. (1994). Estimating Workers' Marginal Willingness to Pay for Job Attributes using Duration Data. *Journal of Human Resources,* 29(3), 911–931.

[230] In this case, the size of the compensating wage differential is a function of the likelihood of working overtime and the amount of overtime worked. If the probability of working overtime is small then the wage differential may not exist.

[231] The Department recognizes that not all workers would prefer to work fewer hours and thus some of these workers might experience an adverse impact. The Department has no basis for estimating this potential negative impact.

Rule. The effect is much more pronounced when limited to just those workers whose hours are adjusted in a given week (the 50 percent of Type 2 workers who work occasional overtime and are identified in the CPS data and all Type 3 workers); they would on average work 24.0 minutes less per week after the Final Rule. The additional time off may potentially make these workers better off.

However, employers may respond to the rule by increasing hours of work for some other employees—especially those who pass the duties test and whose salaries are either already over the proposed threshold or will be adjusted to be so. For these employees, work-life balance may be harmed by the rule, in some cases without increased pay. For EAP employees whose work hours and pay are both reduced, they may seek second jobs in order to restore pay to its original level, thus similarly impacting work-life balance. The impact of this possible effect is unquantified.

Several commenters stated that by reducing excessive overtime the rule will improve work-life balance for employees. The Coalition on Human Needs asserted that one outcome of the proposed rule would be that "[e]mployers . . . will have to acknowledge the value of the 40-hour workweek by . . . limiting workers['] [hours], thus giving them more time with their families." *See also* Center for American Progress; EPI. According to the Center for Effective Government "[the] proposed rule would provide more time protections to the parents of over an estimated 9 million children." [232]

Empirical evidence shows that workers in the United States typically work more than workers in other comparatively wealthy countries.[233] Although estimates of the actual level of overwork vary considerably, executive, administrative, and professional occupations have the highest percentage of workers who would prefer to work fewer hours compared to other occupational categories.[234] Therefore, the Department believes that the Final Rule may result in increased time off for a group of workers who may prefer such an outcome. However, the empirical evidence does not allow us to estimate how many workers would prefer fewer hours or how much workers value this additional time off, so it is difficult to monetize the benefit they may receive.

Furthermore, not all workers would prefer to work fewer hours and thus some of these workers might experience an adverse impact. In addition, the estimated work loss represents an average over all affected workers, and some workers may experience a larger reduction in hours.[235]

5. Health

Working long hours is correlated with an increased risk of injury or health problems.[236] Therefore, by reducing overtime hours, some affected EAP workers' health may improve. This would benefit the workers' welfare, their families' welfare, and society since fewer resources would need to be spent on health. Health has also been shown to be highly correlated with productivity.[237] Some affected employees who work large amounts of overtime may see a significant health impact; for example, workers at the 75th and 90th percentiles of hours worked report working 15 and 20 hours of overtime hours per week, respectively. On average, 25 percent of currently exempt employees who work overtime work at least 10 hours of overtime per week. EPI, NELP, and other commenters noted the poor health effects of working long hours. The beneficial health effects of reduced hours for some newly overtime-eligible employees may be partially offset to the extent that hours worked by other employees, especially those who are overtime exempt, increase. These effects have not been quantified.

6. Increased Productivity

This Final Rule is expected to increase the marginal cost of some workers' labor, predominately due to the overtime pay requirement since almost all affected EAP workers already earn the federal minimum wage. In light of the increased marginal cost of labor for newly overtime-eligible workers, employers may organize workers' time more efficiently, thus increasing productivity. Other channels that may increase marginal productivity include: Worker health (which was addressed above), reduced turnover, and other effects described by efficiency wage theory. Any such net gains would benefit both employers and workers.

Efficiency wages: By increasing earnings this Final Rule may increase a worker's productivity by incentivizing the worker to work harder. Thus the additional cost to firms may be partially offset by higher productivity. In particular, the estimated managerial costs associated with greater monitoring effort may be offset due to this effect. A strand of economic research, commonly referred to as "efficiency wages," considers how an increase in wages may be met with greater productivity.[238] However, this literature tends to focus on firms voluntarily paying higher wages, and thus distinguishing themselves from other firms. Because employer response to this rulemaking will result in wage increases, extrapolating from efficiency wage theory may not be appropriate to estimate the likely effects of the rule.

Some commenters discussed increased productivity as a benefit of the rulemaking, including the AFL–CIO, the American Federation of Teachers, and the IAFF. Individual comments submitted by the National Women's Law Center asserted that paying workers well "will lead to increased productivity, employee loyalty and less worker turn-over" and stated that "the better you treat employees the better the quality of the work they produced."

Conversely, there are channels through which increasing overtime pay may reduce productivity. For example, some overtime hours may be spread to other workers. If the work requires significant project-specific knowledge or skills, then the new worker receiving these transferred hours may be less productive than the first worker, especially if there is a steep learning curve. However, having another worker versed in the project may be beneficial to the firm if the first worker leaves the firm or is temporarily absent (*e.g.,* sick) or by providing benefits of teamwork (*e.g.,* facilitating information exchange).[239] The relative magnitudes of rule-induced increases and decreases in productivity have not been quantified.

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[232] Conversely, some commenters believe the rule will hurt work-life balance because workers who become nonexempt may lose flexibility in setting their schedules (*see* section IV.A.iv.)

[233] For more information, see OECD series, average annual hours actually worked per worker, available at: *http://stats.oecd.org/index.aspx?DataSetCode=ANHRS.*

[234] Hamermesh, D.S., Kawaguchi, D., Lee, J. (2014). Does Labor Legislation Benefit Workers? Well-Being after an Hours Reduction. IZA DP No. 8077.

Golden, L., & Gebreselassie, T. (2007). Overemployment Mismatches: The Preference for Fewer Work Hours. *Monthly Labor Review,* 130(4), 18–37.

Hamermesh, D.S. (2014). Not Enough Time? *American Economist,* 59(2).

[235] It is possible that some employers may choose to eliminate all overtime for affected workers and hire additional workers or spread the work to existing employees to replace the lost hours. The potential for this adjustment is uncertain, and the Department has found no studies that estimate the potential magnitude of this effect. In addition, an employer may be limited in his or her ability to make such adjustments; many affected employees work only a few hours of overtime each week; affected employees' tasks may not be easily divisible; and hiring new workers and/or managing different work flows will impose additional costs on the employer that will offset the savings from avoiding paying the overtime premium.

[236] Keller, S. M. (2009). Effects of Extended Work Shifts and Shift Work on Patient Safety, Productivity, and Employee Health. *AAOHN Journal,* 57(12), 497–502. Kivimäki, M. (2015). Long Working Hours and Risk of Coronary Heart Disease and Stroke: A Systematic Review and Meta-Analysis of Published and Unpublished Data for 603,838 Individuals. *The Lancet,* 386(10005), 1739–1746.

[237] Loeppke, R., Taitel, M., Richling, D., Parry, T., Kessler, R., Hymel, P., et al. (2007). Health and Productivity as a Business Strategy. *Journal of Occupational and Environmental Medicine,* 49(7), 712–721.

[238] Akerlof, G. A. (1982). Labor Contracts as Partial Gift Exchange. *The Quarterly Journal of Economics,* 97(4), 543–569.

Reduction in turnover: Research demonstrates a correlation between earnings and employee turnover—as earnings increase, employee turnover decreases.[240] [241] Reducing turnover may increase productivity, at least partially because new employees have less firm-specific capital (*i.e.,* skills and knowledge that have productive value in only one particular company) and thus are less productive and require additional supervision and training.[242] In short, replacing experienced workers with new workers decreases productivity, and avoiding that will increase productivity. Reduced turnover should also reduce firms' hiring and training costs. As a result, even though marginal labor costs rise, they may rise by less than the amount of the wage change because the higher wages may be offset by lower turnover rates, increased productivity, and reduced hiring costs for firms.

It is difficult to estimate the impact of reduced turnover on worker productivity and firm hiring costs. The potential reduction in turnover is a function of several variables: the current wage, hours worked, turnover rate, industry, and occupation. Additionally, estimates of the cost of replacing a worker who quits vary significantly. Therefore, the Department does not quantify the potential benefit associated with a decrease in turnover attributed to this Final Rule.

7. Reduction in Social Assistance Expenditures

The transfer of income resulting from this Final Rule may result in reduced need for social assistance (and by extension reduced social assistance expenditures by the government). A worker earning the current salary level of $455 per week earns $23,660 annually. If this worker resides in a family of four and is the sole earner, then the family will be considered impoverished. This makes the family eligible for many social assistance programs. Thus, transferring income to these workers may reduce eligibility for government social assistance programs and government expenditures. Several commenters, including Court Appointed Special Advocates and some individual commenters, agreed that the rulemaking would reduce unemployment insurance and social welfare costs.

Benefits for which currently exempt EAP workers may qualify include Medicaid, the Supplemental Nutrition Assistance Program (SNAP), the Temporary Assistance for Needy Families (TANF) program, the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), and school breakfasts and lunches.[243] Quantifying the impact of this Final Rule on government expenditures is complex and thus not estimated here. In order to conduct such an analysis, the Department would need estimates of the transfer per worker, (as noted earlier in this analysis, these estimates average $13.91 per week across affected workers who work overtime and $5.48 across all affected workers), his or her current income level, other sources of family income, number of family members, state of residence, and receipt of aid.

8. Employment Spreading

Because employers will have an incentive to reallocate excessive overtime hours in some cases (for instance, amongst employees who work so many hours that any increase would lead to minimum wage violations), the Final Rule may result in expanded employment opportunities. Several commenters predicted such an expansion. The Society of St. Vincent de Paul stated that that there will be positive spillover effects that will result in "opportunities for new employment for others to fill the hours previously treated as non-compensable but mandatory managerial duties." The Washington Center for Equitable Growth commented that the Department understated the benefits of the rulemaking "by failing to account for employers' tendency to hire additional workers and to schedule non-overtime work in response to the rule change."

Two estimates of job creation were referenced by commenters. The Washington Center for Equitable Growth referenced an analysis by Goldman Sachs estimating the impact of the proposed change in the standard salary level on employment.[244] Goldman Sachs concluded that an increase in the salary threshold from $455 to $970 would result in a total of 120,000 new hires.[245] Legal Aid Society-Employment Law Center referenced a publication by the NRF which, relying on data from Oxford Economics, estimated that a salary threshold of $970 per week would create 117,100 part-time jobs in the retail industry alone.[246] While the Department has some concerns with Oxford Economics' analysis, as discussed in section VI.D.iii., we agree that in some instances employers may hire additional employees to work hours previously worked by newly nonexempt employees. However, as noted earlier, to the extent the individuals hired for the new jobs are already employed elsewhere, the number of individuals who are employed may not increase by as much as the number of jobs increases. Further, to the extent that employers shift overtime hours of newly overtime-eligible employees to part-time or overtime exempt employees who are already on staff, hiring will not increase.

9. Macroeconomic Benefits

Several commenters asserted that the regulations will benefit the economy as a whole. United Steel Workers stated that "[w]hen the workers have more money to spend, businesses have more customers and more incentive to hire and invest." Democracy for America commented the proposed rule "would go a long way in addressing [wage] disparity, strengthening our economy by providing more income to households that they can turn around and spend at businesses, creating new jobs and growing our GDP." There are potential secondary effects (both costs and benefits) of the transfer due to the potential difference in the marginal utility of income and the marginal propensity to consume between workers and business owners. The transfer may result in societal gain during periods when the economy is operating below potential to the extent that transferring income to workers with a relatively high marginal propensity to consume results in a larger multiplier effect and impact on GDP. The Department did not attempt to quantify these potential impacts.

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[239] Some commenters believe productivity would decline. *See* section VI.D.iii.

[240] Howes, Candace. (2005). Living Wages and Retention of Homecare Workers in San Francisco. *Industrial Relations,* 44(1), 139–163. Dube, A., Lester,T.W., & Reich, M.. (2014). Minimum Wage Shocks, Employment Flows and Labor Market Frictions. IRLE Working Paper #149–13.

[241] Note that this literature tends to focus on changes in earnings for a specific sector or subset of the labor force. The impact on turnover when earnings increase across sectors (as would be the case with this regulation) may be smaller.

[242] Argote, L., Insko, C. A., Yovetich, N., & Romero, A. A. (1995). Group Learning Curves: The Effects of Turnover and Task Complexity on Group Performance. *Journal of Applied Social Psychology,* 25(6), 512–529. Shaw, J. D. (2011). Turnover Rates and Organizational Performance: Review, Critique, and Research Agenda. *Organizational Psychology Review,* 1(3), 187–213.

[243] Earned Income Tax Credit (EITC) expenditures could either increase or decrease depending on whether workers are on the "phase-in" or the "phase-out" portion of the EITC-eligibility profile.

[244] Goldman Sachs. (2015). US Daily: The New Federal Overtime Rules: A Greater Effect on Payrolls than Pay.

[245] Goldman Sachs based its analysis on a difference-in-difference-in-difference (DDD) estimate of the impact of the 2004 regulation. This method assumes the 2004 salary level change is comparable to the proposed salary level change, the short duties test is similar to the standard duties test, and all reduced hours will be transferred to new hires. Accordingly, the Department did not conduct a similar analysis in this Final Rule.

[246] National Retail Federation. (2015). The Hidden Cost Of Overtime Expansion.

viii. Regulatory Alternatives

The Department has chosen to update the standard salary level to the 40th percentile of weekly earnings of all full-time salaried workers in the South. As previously discussed, the Department considered a range of alternatives before selecting this methodology and data set. Table 32 presents the alternative salary and compensation levels, the number of affected workers, and the associated costs and transfers. Regulatory familiarization costs are not included because they do not vary over the alternatives.

Alternative 1 inflates the 2004 standard salary level ($455) to FY2015 dollars using the CPI–U. This is $570 per week. At this salary level 538,000 workers would be affected in Year 1, imposing direct adjustment and managerial costs of $47.9 million, transferring $111.4 million in earnings from employers to employees, and resulting in DWL of $0.4 million. Alternative 2 sets the salary level using the 2004 Final Rule method (the 20th percentile of weekly earnings of full-time salaried workers in the South and retail), resulting in a salary level of $596 per week. At this salary level 683,000 workers would be affected in Year 1, imposing direct adjustment and managerial costs of $61.3 million, transferring $145.4 million in earnings from employers to employees, and resulting in DWL of $0.5 million. Alternative 3 uses the salary level based on the Kantor method for the long duties test, resulting in a level of $684 per week. At this salary level 1.4 million workers would be affected in Year 1, imposing direct adjustment and managerial costs of $133.7 million, transferring $318.1 million in earnings from employers to employees, and resulting in DWL of $1.6 million.

Alternative 4 uses the methodology proposed in the NPRM, setting the standard salary level at the 40th percentile of weekly earnings of full-time salaried workers nationally. For the fourth quarter of 2015 this yields a salary level of $972 per week. At this salary level 4.8 million workers would be affected; Year 1 adjustment and managerial costs would equal $470.1 million, with transfers of $1.5 billion, while DWL would equal $7.3 million. Alternative 5 sets the salary level using the Kantor long test method but generates a level more appropriate to the short duties test by multiplying the result times the average historical ratio between the short and long test salary levels (as explained in section VI.C.iii.). This results in a salary level of $1,019 per week. At this salary level, 5.6 million workers are affected, Year 1 adjustment and managerial costs are $541.2 million; Year 1 transfers are $1.8 billion; and Year 1 DWL is $8.4 million. Alternative 6 inflates the 1975 short duties test salary level using the CPI–U to $1,100 per week in FY2015 dollars. At this salary level, 6.7 million workers are affected; Year 1 adjustment and managerial costs are $665.4 million; Year 1 transfers are $2.4 billion; and Year 1 DWL is $11.7 million.

The Department also examined alternatives to the HCE compensation level. HCE alternative 1 left the current $100,000 annual compensation level unchanged. Therefore, no employer costs, transfers, or DWL are associated with this alternative. HCE alternative 2 inflates the 2004 level using the CPI–U and sets the HCE annual compensation level at $125,320 per year. This compensation level would affect 56,000 workers in Year 1 (compared to 65,000 at the chosen compensation level), impose adjustment and managerial costs on employers of $6.7 million, transfer $72.2 million in earnings from employers to employees, and generate $400,000 in DWL. HCE alternative 3 sets the HCE annual compensation level at $149,894 per year, based upon using the same percentile of full-time salaried workers as in the 2004 Final Rule. This compensation level would affect 72,000 workers in Year 1, impose adjustment and managerial costs on employers of $9.4 million, transfer $123.0 million in earnings from employers to employees, and generate $800,000 in DWL.

TABLE 32—UPDATED STANDARD SALARY AND HCE COMPENSATION LEVELS AND ALTERNATIVES, AFFECTED EAP WORKERS, COSTS, AND TRANSFERS, FY2017

Alternative	Salary level	Affected EAP workers (1,000s)	Year 1 impacts (millions)		
			Adj. & managerial costs [a]	Transfers	DWL [b]
Standard Salary Level (Weekly)					
Alt. #1: Inflate 2004 level	$570	538	$47.9	$111.4	$0.4
Alt. #2: 2004 method	596	683	61.3	145.4	0.5
Alt. #3: Kantor long test level	684	1,444	133.7	318.1	1.6
Final	913	4,163	397.0	1,186.6	5.8
Alt. #4: Proposed	972	4,837	470.1	1,476.8	7.3
Alt. #5: Kantor short test	1,019	5,636	541.2	1,779.3	8.4
Alt. #6: Inflate 1975 short test level	1,100	6,684	665.4	2,418.8	11.7
HCE Compensation Level (Annually)					
Alt. #1: No change	$100,000	0	....	....	....
Alt. #2: Inflate 2004 level	125,320	56	6.7	72.2	0.4
Final	134,004	65	8.4	98.5	0.6
Alt. #3: 2004 percentile	149,894	72	9.4	123.0	0.8

Note: Pooled data for FY2013–FY2015 projected to reflect FY2017.

[a] Regulatory familiarization costs are excluded because they do not vary based on the selected values of the salary levels.

[b] DWL was estimated based on the aggregate impact of both the minimum wage and overtime pay provisions. Since the transfer associated with the minimum wage is negligible compared to the transfer associated with overtime pay, the vast majority of this cost is attributed to the overtime pay provision.

ix. Automatic Updates

1. Background

Between periodic updates to the salary level, nominal wages typically increase, resulting in an increase in the number of workers qualifying for the EAP exemption, even if there has been no change in their duties or real earnings. Thus, workers whom Congress intended to be covered by the minimum wage and overtime pay provisions of the FLSA may lose those protections. Automatically updating the standard salary level allows this threshold to keep pace with changes in earnings, allowing it to continue to serve as an effective dividing line between potentially exempt and nonexempt workers. Furthermore, automatically updating the standard salary level and the HCE compensation level will provide employers more certainty in knowing that these levels will change by a small amount on a regular basis, rather than the more disruptive increases caused by much larger changes after longer, uncertain increments of time. This will allow firms to better predict short- and long-term costs and employment needs.

In this Final Rule, the Department is including in the regulations a mechanism for automatically updating the salary levels every three years. The Department will reset the standard salary level to keep it at the 40th percentile of weekly wages of full-time salaried workers in the lowest-wage Census Region (currently the South). The HCE annual compensation level will be updated to keep it at the 90th percentile of weekly wages of full-time salaried workers nationally.

2. Updating Methods Considered

In the NPRM the Department sought comments on whether to automatically update the standard salary level and HCE total compensation level using the Consumer Price Index for All Urban Consumers (CPI–U), or using a fixed percentile of earnings. The CPI–U is the most commonly used price index in the U.S. and is calculated monthly by BLS. The CPI–U is the primary index used by the government to index benefit payments, program eligibility levels, and tax payments. The CPI–U holds quantities constant at base levels while allowing prices to change. The quantities are fixed to represent a "basket of goods and services" bought by the average consumer.

Updating the salary levels based upon the growth rate of earnings at a specified percentile of the weekly earnings distribution is consistent with the Department's historical practice of using salary level as a key criterion for the exemption. The growth rate of earnings reflecting labor market conditions is an appropriate measure of the relative status, responsibility, and independence that characterize exempt workers. While earnings and prices generally mirror one another over time, they do not change in tandem.

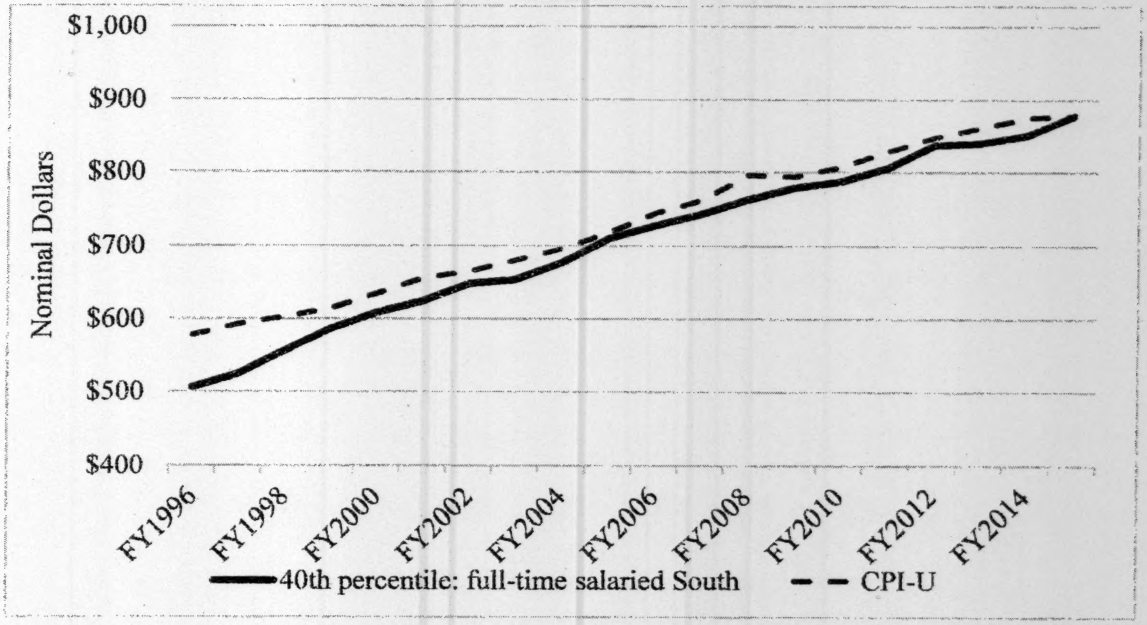
3. Comparison of Indices and Decision To Use Earnings Percentiles

As previously discussed, *see* section IV.E.iii., the Department believes setting and updating the salary level using the same methodology will best ensure that the salary level test effectively differentiates between overtime-eligible white collar workers and workers who may be bona fide EAP employees who are not entitled to overtime and continues to work effectively with the duties test. Accordingly, the Final Rule provides for updating both the standard salary level and the HCE total compensation requirement using a fixed percentile of weekly earnings (40th percentile of full-time workers in the lowest-wage Census Region for the standard salary level; the annualized value of the 90th percentile of full-time salaried workers nationally for the HCE total compensation level).

While the Department has decided not to automatically update the salary level using the CPI–U, we note that in recent years the CPI–U has grown at a rate closely aligned with the 40th percentile of earnings of full-time salaried workers in the South. Between FY2006 and FY2015 the average annual growth rates for the 40th percentile in the South and the CPI–U have been 2.1 percent and 1.8 percent, respectively. The average growth rate at the 90th percentile of full-time salaried earnings nationwide during the same period was 3.0 percent.

The Department compared the standard salary levels that would have resulted from 1995 to 2015 if (1) the standard salary level was set each year to the 40th percentile of weekly earnings of full-time salaried workers in the South, and (2) the standard salary level was set using the growth in the CPI–U (and setting the level in 2014 to match the 40th percentile earnings level in the South, *i.e.,* $913 per week) (Figure 5). While not identical, the data show that these two methods produced similar results.

Figure 5: Estimated Historical Standard Salary Level with Automatic Updating, FY1996-FY2015



4. Concerns With Use of Fixed Earnings Percentile as Automatic Updating Methodology

As discussed in detail in section IV.E.iii., some commenters expressed concern that automatically updating the salary level using a fixed percentile of earnings would result in the salary levels growing at too quick a rate. *See, e.g.,* American Bankers Association; AIA–PCI ; Chamber. Specifically, these commenters stated that if the standard salary level is set at a fixed percentile of earnings of full-time salaried workers, and some or all of the newly nonexempt workers are converted to hourly status and thus removed from the data set, earnings at that 40th percentile of salaried workers will quickly rise solely due to the exclusion of these hourly workers (an effect many commenters representing employers referred to as "ratcheting"). Commenters asserted that this may cause growth in the 40th percentile of full-time salaried workers to no longer reflect prevailing economic conditions.

Claims that automatic updating using the fixed percentile approach will lead to the rapid escalation of the salary level are based primarily on the assumption that employers will respond to this rulemaking by converting newly nonexempt workers to hourly pay status. However, the Department believes these concerns are overstated because many affected EAP workers who are reclassified as nonexempt are likely to remain salaried as: (1) An analysis of the 2004 salary level updates did not indicate significant numbers of workers were converted to hourly pay; and (2) an analysis of updates in California's higher salary level did not indicate significant numbers of workers were reclassified as hourly. In any event, the Department's modeling of the impact of automatic updating shows that any potential "ratcheting" effect that may occur would be small, largely because newly nonexempt workers compose a small percentage of the pool of full-time nonhourly workers in the dataset used to establish the salary level.

The analyses below are based on CPS MORG data. As acknowledged in the NPRM, salary status for CPS respondents cannot definitively be determined because workers who indicate they are paid on a salary basis or on some basis other than hourly are all classified as "nonhourly." To consider the possibility this biases our results, we looked at the Panel Study of Income Dynamics (PSID). The PSID provides additional information concerning salaried versus other nonhourly workers. In the PSID, respondents are asked how they are paid on their main job and are asked for more detail if their response is some way other than salaried or hourly.[247] The available responses include piecework, commission, self-employed/farmer/profits, and by the job/day/mile. None of these options are ones to which employers are likely to change their salaried workers. The share of workers who are not paid on either an hourly or salaried basis is relatively small, about 10 percent of workers in the PSID. Accordingly, grouping nonhourly workers with salaried workers does not negate the following comparisons and conclusions based on CPS data.

Workers May Remain Salaried Even if Nonexempt

The Department disagrees with commenters that suggested that employers will likely (or automatically) convert large numbers of newly nonexempt employees to hourly pay status. In some instances such conversation may occur, for example, if an employee regularly works overtime and the employer is able to adjust his or her regular rate. However, for the majority of affected employees, there will be no incentive for employers to convert them to hourly pay because they do not work overtime. Also, employers may have other incentives to maintain workers' salary status; for example, they may offer salaried positions to attract talent. Commenters highlighted that employees value job characteristics associated with salaried pay—such as earnings predictability—and so employers may pay nonexempt employees on a salary basis to preserve employee morale. Using the CPS MORG data pooled for FY2013–FY2015 and projected to FY2017, the Department estimated that 18.6 percent of white collar workers earning below $455 per week are nonhourly; based on findings from the PSID, the Department believes most of these nonhourly workers are salaried.

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[247] This question is only asked of "heads" and "wives" in the PSID (*i.e.*, heads of households and their spouses). However, in the 2013 PSID, "heads" and "wives" composed 88 percent of workers.

Previous Salary Level Updates Did Not Indicate Workers Being Converted to Hourly

The Department analyzed employer responses to the 2004 Final Rule and to a series of revisions to California's salary level test for exemption under state law in order to better estimate whether workers who are reclassified as nonexempt are more likely to be paid on an hourly basis. These analyses allow the identification of any potential regulatory impact while controlling for time trends and a broad range of other relevant factors (education, occupation, industry, geographic location, etc.). The Department found no evidence that changes in the salary level for exemption resulted in a statistically significant increase in the percent of full-time white collar workers paid on an hourly basis following either the 2004 Final Rule or the California salary level updates. *See* section VI.D.iii.5 for discussion of the applicability of these results to this Final Rule.

2004 Final Rule. In 2004, the salary level required to be eligible for exemption increased from $250 per week (short salary level) to $455 (the standard salary level).[248] To estimate the effect of this salary level update on the share of full-time, white collar workers paid hourly, the Department conducted a difference-in-differences (DD) analysis of the 2004 part 541 salary level revisions. The Department modeled two types of differences to include in the analysis:

Difference #1 (pre- versus post-rulemaking): January–March 2004 versus January–March 2005,[249]

Difference #2 (workers exempt before, but not after rule compared to workers exempt both before and after the rule): Workers earning between $250 and $455 per week versus those earning at least $455 but less than $600.[250]

Using this DD analysis, the Department found no evidence that changes in the salary level for exemption resulted in a statistically significant increase in the percent of full-time white collar workers paid on an hourly basis following the 2004 Final Rule.[251] This can also be demonstrated by looking directly at the share of workers paid hourly; the Department found that following the 2004 Final Rule, the percent of full-time white collar workers who were paid hourly decreased from 74.6 percent to 73.6 percent in the affected earnings range ($250–$455), while it increased from 60.9 percent to 63.6 percent in the earnings range where there were no changes to EAP exemption eligibility. In other words, between the first quarter of 2004 and the first quarter of 2005, the share of full-time white-collar workers who are paid hourly decreased marginally in the group of potentially affected workers (those earning $250 to $455), whereas in the group earning above the salary level (those earning more than $455 but less than $600) it increased by 2.6 percentage points.

California. The exempt salary level in California is set by statute as equal to twice the state minimum wage for 40 hours worked per week. The salary level has been updated four times in recent years when California raised the state minimum wage: In 2007 (from $540 to $600), 2008 (from $600 to $640), 2014 (from $640 to $720), and 2016 (from $720 to $800). To estimate the effect of the salary level update on the share of white collar workers paid hourly, the Department conducted difference-in-differences-in-differences (DDD) analyses of the revisions to the California exempt salary level for which CPS data were available (2007–2008, and 2014).[252]

The Department modeled three types of differences to include in the analyses:

Difference #1 (pre- versus post-rulemaking):

2007–2008: January–March 2006 versus January–March 2008, and 2014: January–March 2014 versus January–March 2015.[253]

Difference #2 (workers exempt before, but not after rule compared to workers exempt both before and after the rule):

2007–2008: Workers earning between $540 and $640 versus those earning at least $640 but less than $740, and

2014: Workers earning between $640 and $720 versus workers earning at least $720 but less than $800.

Difference #3: California workers versus workers in other states where the salary level was not increased.[254]

Using this DDD analysis, the Department found no evidence that changes in the salary level for exemption resulted in a statistically significant increase in the percent of full-time white collar workers paid on an hourly basis.[255] This can also be

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[248] The 2004 Final Rule increased the salary level from the previous long test level of $155 per week (executive and administrative exemptions) or $170 per week (professional exemption) to $455 per week. For purposes of this analysis, the Department compared the increase from the short test salary level ($250 per week) since the long test was no longer operative due to increases in the minimum wage.

[249] The 2004 Final Rule was published April 23, 2004 and went into effect August 23, 2004.

[250] In order to isolate the potential effect on earnings due to the 2004 salary changes, we excluded workers in states where the state EAP salary level was higher than the FLSA short salary level (*i.e.*, Alaska, California, Connecticut, Maine and New York).

[251] The shares provided in the text do not control for other covariates. However, using a DD regression approach that includes a full complement of controls (age, education, gender, race, ethnicity, occupation, industry, state of residence, working overtime, multiple job holding), the relevant marginal effect is −0.033 (*i.e.*, the amount the likelihood of being paid hourly changes post rulemaking for workers earning between $250 and $455 per week relative to the change for workers earning $455 or above) and the p-value is 0.118, which is not statistically significant at conventional thresholds for significance. The difference-in-differences model used can be written as where H_i is equal to 1 if worker i is paid by the hour and 0 otherwise, T_i is equal to 1 if worker i earns at least $250 but less than $455 and 0 if she earns between $455 and $600, P_i is equal to 1 for the post-change period (Jan.–Mar. 2005) and 0 for the pre-change period (Jan.–Mar. 2004), and C_i is the set of worker-specific controls. The model was estimated using a probit regression.

[252] California raised the state minimum wage in January of both 2007 and 2008. These changes were announced jointly in September 2006. Because employers knew that a second increase in the exempt salary level would occur one year after the 2007 increase, the Department expected that they planned their adjustments accordingly rather than treat the two increases as isolated independent events. Therefore the Department considered the combined effects of the 2007 and 2008 changes.

[253] The minimum wage update took place in July 2014.

[254] We excluded Alaska, Connecticut and New York because the state EAP salary levels either: (1) Were above the FLSA standard salary level; (2) differed in the time periods considered; or (3) both (1) and (2).

[255] The shares provided in the text do not control for other covariates. However, using a DDD regression approach that includes a full complement of controls (age, education, gender, race, ethnicity, occupation, industry, state of residence, working overtime, multiple job holding), the relevant marginal effect for 2007–2008 is 0.018 and the p-value is 0.612. The marginal effect of the triple difference for 2014 is −0.057 and the p-value is 0.103. Neither of these are statistically significant at conventional thresholds for significance. The difference-in-difference-in-differences model used can be written as

where H_i is equal to 1 if worker i is paid by the hour and 0 otherwise, T_i is equal to 1 if worker i earns between the old threshold and the new threshold and 0 if she earns just above the new threshold, P_i is equal to 1 for the post-change period and 0 for the pre-change period, S_i is equal to 1 if worker i is in California and 0 if she is in other states where the salary level was not increased, and C_i is the set of worker-specific controls. The model

Continued

demonstrated by looking directly at the share of workers paid hourly (using differences one and three). After the 2007–2008 California update, among Californians earning between the old and new salary levels, the share of full-time white collar workers being paid hourly decreased slightly from 73.4 percent to 73.1 percent. Among full-time white collar workers earning comparable amounts in states where the salary level did not change, the share of workers being paid hourly increased from 66.2 percent to 67.5 percent. After the 2014 California update, the values increased from 72.0 percent to 74.0 percent in California, and increased from 68.2 percent to 69.4 percent in other states.[256] Neither of these results suggests that the salary updates resulted in a significantly greater percent of affected workers being converted to hourly pay in California as compared to the rest of the United States.

The Department's Modeling of Possible "Ratcheting" Indicates Any Effect Would Be Negligible

In a study submitted by the PPWO, Edgeworth Economics estimated the impact that automatic updating using the fixed percentile approach would have on the salary level. They found that "[i]f just one quarter of the full-time non-hourly workers earning less than $49,400 per year ($950 per week) were reclassified as hourly workers, the pay distribution among the remaining non-hourly workers would shift so that the 40th percentile of the 2016 pay distribution would be $54,184 ($1,042 per week), about 9.6 percent higher than it was in 2015." Their estimate was based on the key assumption that one quarter of all full-time nonhourly employees would be converted to hourly pay each year. Accordingly, based on the Department's reading of the Edgeworth Economics' analysis, it appears they converted one quarter of all full-time nonhourly employees earning below the salary level to hourly status. This modeling is inappropriate because it fails to account for whether the employees perform white collar work and are subject to the EAP exemption, and ignores that, at most, employers will only have an incentive to convert affected workers (a small share of all full-time nonhourly employees).

Oxford Economics also considered how converting salaried workers to hourly status could influence automatically updated salary levels. In one analysis, they assumed that employers will convert the lowest 40 percent of full-time salaried workers to hourly status in 2016, and that by Year 2 the 40th percentile of the new distribution of salaried workers would be equivalent to the 64th percentile of the original distribution. The Department believes this model is clearly unrealistic. Like Edgeworth Economics, Oxford Economics erroneously assumes that workers who are not affected by the new salary would nonetheless be converted to hourly status.

In another analysis, Oxford Economics estimated employer response to updating the threshold to $970 in 2016. According to their analysis, approximately 695,000, or nearly one third, of the 2,189,000 affected workers will be converted from "salaried exempt" to "hourly nonexempt." Oxford Economics concluded that about two-thirds of these converted employees will have their hourly rates decreased to leave their earnings unchanged, and one third will have their hours reduced to 38 per week. However, neither analysis appears to account for the possibility that employers may continue to pay some newly nonexempt employees on a salary basis, and thus both predictions likely overestimate the number of workers converted to hourly status.

The Department conducted a similar analysis, using what the Department believes are more realistic assumptions, and found a significantly smaller potential impact. The Department considered which affected workers are most likely to be converted from salaried to hourly pay as a result of this rulemaking. Type 4 workers, those whose salaries are increased to the new standard salary level, remain exempt and their method of pay will not change. Type 3 workers, who regularly work overtime and become nonexempt, and Type 2 workers, those who occasionally work overtime and become nonexempt, are the most likely to have their pay status changed. Type 1 workers (who make up more than 60 percent of the affected workers) are assumed to not work overtime, and employers thus have little incentive to convert them to hourly pay. For this analysis, the Department assumed all Type 2 and Type 3 workers are converted to hourly status to generate a realistic upper bound of the magnitude of any possible ratcheting effect. The Department estimated that the salary level in 2026, after three updates, the salary level as set in the Final Rule (based on weekly earnings of full-time salaried workers in the South) could be approximately 2.5 percent higher than expected due to this effect. This figure is significantly smaller than the estimates provided by the commenters. Furthermore, we believe our estimate is an overestimate because it assumes employers convert all Type 2 and Type 3 workers to hourly status, which, for the reasons discussed above and in section IV.E.iii. of the preamble, the Department believes is a highly unlikely outcome.

x. Projections

1. Methodology

The Department projected affected workers, costs, and transfers forward for ten years. This involved several steps. First, past growth in the earnings distribution was used to estimate future salary levels. Second, workers' earnings, absent a change in the salary levels, were predicted. Third, predicted salary levels and earnings were used to estimate affected workers. Fourth, employment adjustments were estimated and adjusted earnings were calculated. Lastly, costs and transfers were calculated.

First, in years when the salary level is updated, the predicted salary levels are estimated using the historic geometric growth rate between FY2005 and FY2015 in (1) the 40th earnings percentile of full-time salaried workers in the South for the standard salary level and (2) the 90th earnings percentile of full-time salaried workers nationally for the HCE compensation level, projected to the second quarter of the respective years before the updated levels go into effect. Second, the Department calculated workers' projected earnings in future years by applying the annual projected wage growth rate in the workers' industry-occupation to current earnings, as described in section VI.B.ii. Third, we compared workers' counter-factual earnings (*i.e.*, absent the rulemaking) to the predicted salary levels. If the counter-factual earnings are below the relevant salary level (*i.e.*, standard or HCE) then the worker is considered affected. In other words, in each year affected EAP workers were identified as those who would be exempt in FY2017 absent the rule change but have projected earnings in the future year that are less than the relevant salary

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was estimated using a probit regression. The Department also performed alternative analyses to check whether these results hold, including (1) a comparison of California and other states looking only at workers with earnings below the revised salary level (*i.e.*, eliminating Difference #2 from the DDD model), and (2) running simplified models without individual controls. None of these checks found a significant increase in the percentage of workers paid on an hourly basis.

[256] The increase in the proportion of workers paid on an hourly basis in the relevant salary range in California is not statistically different from the increase in the proportion for workers in other states.

level. Sampling weights were also adjusted to reflect employment growth as explained in section VI.B.ii.

Adjusted hours for workers affected in Year 1 were re-estimated in Year 2 using a long-run elasticity of labor demand of −0.4.[257] For workers newly affected in Year 2 through Year 10, employers' wage and hour adjustments due to the rulemaking are estimated in that year, as described in section VI.D.iv., except the long-run elasticity of labor demand of −0.4 is used. Employer adjustments are made in the first year the worker is affected and then applied to all future years in which the worker continues to be affected (unless the worker switches to a Type 4 worker). Workers' earnings in predicted years are earnings post employer adjustments, with overtime pay, and with ongoing wage growth based on historical growth rates (as described above).

Very few commenters discussed the Department's projections for Year 2 through Year 10 in the NPRM's analysis. Dan Goldbeck[258] stated, in an article cited by the Association of Energy Service Companies, that in the NPRM, the Department reported only Year 2 and Year 10 projected estimates, making it "difficult to know the accuracy of this calculation." *See also* International Bancshares Corporation. In the Final Rule, the Department has included projected costs in each of the nine projected years.

2. Estimated Projections

The Department estimated that in Year 1, 4.2 million EAP workers will be affected, with about 65,000 of these attributable to the revised HCE compensation level. In Year 10, the number of affected EAP workers was estimated to equal 5.3 million with 217,000 attributed to the HCE exemption. The projected number of affected EAP workers accounts for anticipated employment growth by increasing the number of workers represented by the affected EAP workers (*i.e.*, increasing sampling weights).

The projected number of affected workers includes workers who were not EAP exempt in the base year but would have become exempt in the absence of this Final Rule in Years 2 through 10. For example, a worker may earn less than $455 in FY2017 but between $455 and $913 in subsequent years; such a worker would be counted as an affected worker. In the absence of this Final Rule he or she would likely have become exempt at some point during the 9 projected years; however, as a result of the Final Rule, this worker remains nonexempt, and is thus affected by the Final Rule. In the NPRM the Department considered these workers separately from affected workers and did not estimate costs and transfers associated with these workers.[259]

The Department quantified three types of direct employer costs in the ten-year projections: (1) Regulatory familiarization costs; (2) adjustment costs; and (3) managerial costs. Regulatory familiarization costs only occur in Year 1 and years when the salary levels are automatically updated. Thus, in addition to Year 1, some regulatory familiarization costs are expected to occur in Year 4 (FY2020), Year 7 (FY2023), and Year 10 (FY2026).[260] Specifically, the Department added 5 minutes per establishment for regulatory familiarization time to access and read the published notice in the **Federal Register** with the updated standard salary level and HCE compensation level in years when the salary level is updated. In each of these three years (FY2020, FY2023, and FY2026) regulatory familiarization costs are approximately $23 million (*see* section VI.D.iii. for details on the methodology for estimating costs).

Although start-up firms must still become familiar with the FLSA following Year 1, the difference between the time necessary for familiarization with the current part 541 exemptions and those exemptions as modified by the Final Rule is essentially zero. Therefore, projected regulatory familiarization costs for new entrants over the next nine years are zero (although these new entrants will incur regulatory familiarization costs in years when the salary and compensation levels are updated).

Adjustment costs and managerial costs are a function of the number of affected EAP workers and thus will be higher with automatic updating. Adjustment costs will occur in any year in which workers are newly affected. After Year 1, these costs are estimated to be relatively small since the majority of workers affected by this rulemaking are affected in Year 1, and the costs occur almost exclusively in years when the salary is automatically updated. Management costs recur each year for all affected EAP workers whose hours are adjusted. Therefore, managerial costs increase modestly over time as the number of affected EAP workers increases. The Department estimated that Year 1 managerial costs would be $214.0 million (section VI.D.iii.); by Year 10 these costs would grow slightly to $255.1 million. In years without automatic updates managerial costs fall slightly since earnings growth will cause some workers to no longer be affected in those years. In all years between 94 and 98 percent of costs are attributable to the revised standard salary level (Table 33).

The Department projected two types of transfers from employers to employees associated with workers affected by the regulation: (1) Transfers due to the minimum wage provision and (2) transfers due to the overtime pay provision. Transfers to workers from employers due to the minimum wage provision, estimated to be $34.3 million in Year 1, are projected to decline to $17.8 million in Year 10 as increased earnings over time move workers' regular rate of pay above the minimum wage.[261] Transfers due to overtime pay should grow slightly over time because the number of affected workers will increase, although transfers fall in years between automatic updates. Transfers to workers from employers due to the overtime pay provision increase from $1,250.8 million in Year 1 to $1,589.4 million in Year 10. Workers affected by the revised standard salary level account for between 80 and 92 percent of overtime transfers in all years.

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[257] This elasticity estimate is based on the Department's analysis of the following paper: Lichter, A., Peichl, A. & Siegloch, A. (2014). The Own-Wage Elasticity of Labor Demand: A Meta-Regression Analysis. IZA DP No. 7958.

[258] Goldbeck, D. (2015). "White Collar" Overtime Expansion. *Regulation Review.*

[259] These workers were not considered in the NPRM because their work patterns are known when they are nonexempt (because they earn less than $455), but those patterns might change if they become exempt (*e.g.*, they may work more hours). However, because a significant number of additional workers are projected to remain nonexempt through this process, the Department chose to include them in the analysis for this Final Rule. To do so, we assume their exempt work patterns will be similar to their nonexempt work patterns.

[260] The first update will go into effect January 1, 2020. However, for this economic analysis, the Department modeled the first automatic update to occur at the beginning of FY2020. This is because the analysis is conducted by fiscal year and modeling the update as going into effect a quarter before allows simplification of the analysis with only a negligible impact on estimates.

[261] State minimum wages above the federal level as of January 1, 2016 were incorporated and used for projected years. Increases in minimum wages were not projected. If state or federal minimum wages increase between January 1, 2016 and FY2026, then estimated projected minimum wage transfers may be underestimated.

TABLE 33—PROJECTED COSTS AND TRANSFERS, STANDARD AND HCE SALARY LEVELS

Fiscal year (year #)	Affected EAP workers (millions)	Costs				Transfers			DWL[b]
		Reg. Fam.	Adjustment[a]	Managerial	Total	Due to MW	Due to OT	Total	
		(Millions FY2017$)							
Year:									
2017 (1)	4.2	272.5	191.4	214.0	677.9	34.3	1,250.8	1,285.2	6.4
2018 (2)	4.0	0.0	1.5	206.6	208.0	28.5	907.9	936.5	8.7
2019 (3)	3.9	0.0	1.9	200.6	202.6	27.7	883.9	911.6	8.5
2020 (4)	4.6	22.8	10.4	232.5	265.7	25.8	1,221.2	1,247.0	9.8
2021 (5)	4.4	0.0	2.8	223.7	226.5	24.6	1,134.7	1,159.2	9.6
2022 (6)	4.3	0.0	2.8	217.6	220.5	20.5	1,017.3	1,037.8	9.4
2023 (7)	5.0	23.0	7.3	243.4	273.7	18.0	1,404.6	1,422.6	10.2
2024 (8)	4.8	0.0	2.5	236.1	238.6	15.2	1,290.0	1,305.3	10.0
2025 (9)	4.6	0.0	2.2	230.9	233.1	14.4	1,193.2	1,207.6	10.1
2026 (10)	5.3	23.1	5.9	255.1	284.2	17.8	1,589.4	1,607.2	11.1
Average Annualized:									
3% real rate		37.6	25.4	225.0	288.0	23.2	1,178.5	1,201.6	9.3
7% real rate		42.4	29.0	223.6	295.1	23.8	1,165.3	1,189.1	9.2

[a] Adjustment costs occur in all years when there are newly affected workers, including years when the salary level is not updated. Adjustment costs may occur in years without updated salary levels because some workers' projected earnings are estimated using negative earnings growth.

[b] DWL was estimated based on the aggregate impact of both the minimum wage and overtime pay provisions. Since the transfer associated with the minimum wage is negligible compared to the transfer associated with overtime pay, the vast majority of this cost is attributed to the overtime pay provision.

Table 33 also summarizes average annualized costs and transfers over the ten-year projection period, using 3 percent and 7 percent real discount rates. The Department estimated that total direct employer costs have an average annualized value of $295.1 million per year over ten years when using a 7 percent real discount rate. Of this total, average annualized regulatory familiarization costs were estimated to be $42.4 million. Average annualized adjustment costs were estimated to be $29.0 million. The remaining $223.6 million in average annualized direct costs were accounted for by managerial costs. The average annualized value of total transfers was estimated to equal $1,189.1 million. The largest component of this was the transfer from employers to workers due to overtime pay, which was $1,165.3 million per year, while average annualized transfers due to the minimum wage totaled $23.8 million per year.

The cost to society of fewer hours of labor demanded, expressed as DWL, was estimated to be $6.4 million in Year 1. DWL increases over time and in Year 10 it is projected to equal $11.1 million. DWL increases sharply between Year 1 and Year 2 because the Department assumes the market has had time to fully adjust to the revised standard salary and HCE annual compensation levels by Year 2. In Year 1 employers may not be able to fully adjust wages and hours in response to the rulemaking, so the Department used a short run wage elasticity of labor demand to reflect this constrained response; in Year 2 employers have sufficient time to fully adjust, and a long-run wage elasticity is used. Therefore, the decrease in hours worked is larger in Year 2 than Year 1, and the DWL is also larger. Finally, the Department estimated that average annualized DWL was $9.2 million per year.

A summary of the estimates used in calculating DWL for years 1, 2 and 10 is presented in Table 34. The size of the DWL depends on the change in average hourly wages, the change in average hours, and the number of affected EAP workers with changes in their hours worked. While the change in average hourly wages generally tends to be fairly similar over time, the number of affected EAP workers increases in years with updated salary levels and falls in other years; together these lead to a slight increase in annual DWL over time.

TABLE 34—SUMMARY OF PROJECTED DEADWEIGHT LOSS COMPONENT VALUES

Component	Year 1	Future years	
		Year 2	Year 10
	Standard salary		
Average hourly wages (holding hours constant)			
Pre	$14.86	$14.94	$17.59
Post[a]	$15.55	$15.45	$18.20
Change	$0.69	$0.51	$0.61
Change in average overtime hours	−0.40	−0.76	−0.79
Affected EAP workers (1,000s)	803	778	903
DWL			
Per worker per week	$0.14	$0.20	$0.24
Nominal annual (millions)	$5.8	$7.9	$11.3
Real annual (millions of FY2017$)	$5.8	$7.9	$9.2
	HCE		
Average hourly wages (holding hours constant)			
Pre	$42.84	$42.51	$45.03
Post[a]	$44.85	$43.96	$46.56
Change	$2.01	$1.45	$1.53

TABLE 34—SUMMARY OF PROJECTED DEADWEIGHT LOSS COMPONENT VALUES—Continued

Component	Year 1	Future years	
		Year 2	Year 10
Change in average overtime hours	−0.37	−0.69	−0.68
Affected EAP workers (1,000s)	31	34	83
DWL			
Per worker per week	$0.38	$0.50	$0.52
Nominal annual (millions)	$0.61	$0.88	$2.25
Real annual (millions of FY2017$)	$0.61	$0.87	$1.85

Note: DWL analysis is limited to workers in Types 2 and 3 who experience hour adjustments.

[a] Despite general growth in wages, the average wage may fall slightly from Year 1 to Year 2 because the population has changed.

3. Comparison to Projections With Alternative Methods

This section presents estimated projected impacts without automatic updating and using the CPI–U to automatically update salary levels. Projections without automatic updating are shown so impacts of the initial increase and subsequent increases can be disaggregated. Projections using the CPI–U are included because this alternative was proposed as a potential method in the NPRM.

For the CPI–U method, the Department used the predicted change in annual CPI–U values for FY2017 through FY2026 from the Congressional Budget Office.[262] For example, inflation based on the CPI–U for FY2017, FY2018, and FY2019 is predicted to be 2.2, 2.4, and 2.4 percent, respectively; therefore, the projected salary level for Year 4 (the year of the first salary level update) is $978 ($913 × 1.022 × 1.024 × 1.024). In other years, predicted inflation based on the CPI–U was projected to be 2.4 percent.

Table 35 shows projected numbers of affected workers, costs, and transfers with these alternative methods. With triennial automatic updating as adopted in this Final Rule, the number of affected EAP workers would increase from 4.2 million to 5.3 million over 10 years. With triennial automatic updating using the CPI–U, the number of affected EAP workers would increase from 4.2 million to 5.4 million over 10 years. Conversely, in the absence of automatic updating, the number of affected EAP workers is projected to decline from 4.2 to 3.0 million.

The three costs to employers previously considered are (1) regulatory familiarization costs, (2) adjustment costs, and (3) managerial costs. Regulatory familiarization costs do not vary depending on whether the fixed percentile method or the CPI–U method is used for automatic updating, and are only slightly lower without automatic updating. Adjustment costs and managerial costs are a function of the number of affected EAP workers and so will be higher with automatic updating. Average annualized direct costs were projected to be very similar with the fixed percentile method and the CPI–U method: $295.1 million and $294.7 million, respectively. Average annualized direct costs are lower without automatic updating because fewer workers will be affected ($249.8 million).

Average annualized transfers and DWL follow a similar pattern: estimates are very similar for the fixed percentile method and the CPI–U method, but are lower without automatic updating. Average annualized transfers are $1,189.1 million with the fixed earnings percentile, $1,172.6 million with the CPI–U method, and $873.5 million without automatic updating. Average annualized DWL is $9.2 million with the fixed earnings percentile, $9.2 million with the CPI–U method, and $7.7 million without automatic updating.

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[262] Congressional Budget Office. (2016). *The Budget and Economic Outlook: 2016 to 2026.* Pub. No. 51129. Table E–2.

Table 35: Comparison of Projected Costs and Transfers with Alternative Methods, Standard and HCE Salary Levels

Fiscal Year (Year #)	Affected EAP Workers			Costs			Transfers			DWL		
	Fixed Perc.	Without Updates	CPI-U	Fixed Perc.	Without Updates	CPI-U	Fixed Perc.	Without Updates	CPI-U	Fixed Perc.	Without Updates	CPI-U
	(Millions)			(Millions FY2017$)								
Year												
2017 (1)	4.2	4.2	4.2	$677.9	$677.9	$677.9	$1,285.2	$1,285.2	$1,285.2	$6.4	$6.4	$6.4
2018 (2)	4.0	4.0	4.0	$208.0	$208.0	$208.0	$936.5	$936.5	$936.5	$8.7	$8.7	$8.7
2019 (3)	3.9	3.9	3.9	$202.6	$202.6	$202.6	$911.6	$911.6	$911.6	$8.5	$8.5	$8.5
2020 (4)	4.6	3.8	4.5	$265.7	$197.8	$258.7	$1,247.0	$878.7	$1,176.1	$9.8	$8.4	$9.6
2021 (5)	4.4	3.6	4.4	$226.5	$190.4	$222.6	$1,159.2	$834.9	$1,079.4	$9.6	$8.1	$9.4
2022 (6)	4.3	3.5	4.2	$220.5	$181.7	$218.8	$1,037.8	$793.2	$1,006.7	$9.4	$7.7	$9.4
2023 (7)	5.0	3.3	5.0	$273.7	$173.4	$278.1	$1,422.6	$753.3	$1,416.7	$10.2	$7.5	$10.3
2024 (8)	4.8	3.2	4.8	$238.6	$164.9	$239.5	$1,305.3	$711.9	$1,306.4	$10.0	$7.3	$10.1
2025 (9)	4.6	3.1	4.6	$233.1	$157.6	$232.8	$1,207.6	$669.7	$1,175.1	$10.1	$7.2	$10.1
2026 (10)	5.3	3.0	5.4	$284.2	$150.7	$292.1	$1,607.2	$649.2	$1,678.0	$11.1	$7.3	$11.3
Average Annualized												
3% real rate	--	--	--	$288.0	$238.7	$287.9	$1,201.6	$855.9	$1,185.9	$9.3	$7.7	$9.3
7% real rate	--	--	--	$295.1	$249.8	$294.7	$1,189.1	$873.5	$1,172.6	$9.2	$7.7	$9.2

Appendix A: Methodology for Estimating Exemption Status

The number of workers exempt under the FLSA's part 541 regulations is unknown. It is neither reported by employers to any central agency nor asked in either an employee or establishment survey.[263] The

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[263] RAND recently released results from a survey conducted to estimate EAP exempt workers. Rohwedder, S. and Wenger, J.B. (2015). The Fair Labor Standards Act: Worker Misclassification and

Department estimated the number of exempt workers using the following methodology. This methodology is based largely on the approach used during the 2004 revisions.[264] This appendix expands on the methodology description in the Final Rule.

A.1 The Duties Tests Probability Codes

The CPS MORG data do not include information about job duties. To determine whether a worker meets the duties test the Department employs the methodology it used in the 2004 Final Rule. Each occupation is assigned a probability representing the odds that a worker in that occupation would pass the duties test. For the EAP duties test, the five probability intervals are:

- Category 0: Occupations not likely to include any workers eligible for the EAP exemptions.
- Category 1: Occupations with probabilities between 90 and 100 percent.
- Category 2: Occupations with probabilities between 50 and 90 percent.
- Category 3: Occupations with probabilities between 10 and 50 percent.
- Category 4: Occupations with probabilities between 0 and 10 percent.[265]

The occupations identified in this classification system represent an earlier occupational classification scheme (the 1990 Census Codes). Therefore, an occupational crosswalk was used to map the previous occupational codes to the 2002 Census occupational codes which are used in the CPS MORG 2002 through 2010 data.[266] [267] When the new occupational category was comprised of more than one previous occupation, the Department assigned a probability category using the weighted average of the previous occupations' probabilities, rounded to the closest category code.

Next, the Department must determine which workers to classify as exempt. For example, the probability codes indicate that out of every ten public relation managers between five and nine are exempt; however, the Department does not know which five to nine workers are exempt. Exemption status could be randomly assigned but this would bias the earnings of exempt workers downward, since higher paid workers are more likely to perform the required duties. Therefore, the probability of being classified as exempt should increase with earnings. First, the Department assigned the upper bound of the probability range in each exemption category to workers with top-coded weekly earnings. For all other white collar salaried workers earning at least $455 per week in each exemption category,[268] the Department estimated the probability of exemption for each worker in the data based on both occupation and earnings using a gamma distribution.[269] For the gamma distribution, the shape parameter alpha was set to the squared quotient of the sample mean divided by the sample standard deviation, and the scale parameter beta was set to the sample variance divided by the sample mean. These parameter calculations are based on the method described in the 2004 rulemaking, except for the use of the standard deviation instead of the standard error.[270] Table A1 shows that the expected number of exempt workers is similar when using a gamma distribution method and assigning the midpoint of each probability code range to all workers in that probability code. After determining the probabilities of exemption for each worker in the data (dependent on both occupation and earnings), the Department randomly assigns exemption status to each worker, conditional on the worker's probability of exemption.

TABLE A1—COMPARISON OF EAP-EXEMPT WORKER ESTIMATES[a]

Probability code category	Midpoint probability	Gamma distribution model
High probability of exemption (1)	23,134,055	23,165,165
Probably exempt (2)	4,808,003	4,792,536
Probably not exempt (3)	1,675,615	1,644,144
Low or no probability of exemption (4)	277,473	287,310
Total	29,895,146	29,889,154

[a] Numbers shown are the expected value of the number of workers exempt in each of the four probability code categories.

The 2004 Final Rule assigned probabilities for whether workers in each occupation would pass the HCE abbreviated duties test if they earned $100,000 or more in total annual compensation; these probabilities are:

- Category 0: Occupations not likely to include any workers eligible for the HCE exemption.
- Category 1: Occupations with a probability of 100 percent.
- Category 2: Occupations with probabilities between 94 and 96 percent.
- Category 3: Occupations with probabilities between 58.4 and 60 percent.
- Category 4: Occupations with a probability of 15 percent.

Like under the standard test, there is a positive relationship between earnings and exemption status; however, unlike the standard test, the relationship for the HCE analysis can be represented well with a linear earnings function. Once individual probabilities are determined, workers are randomly assigned to exemption status.

A.2 Other Exemptions

There are many other exemptions to the minimum wage and overtime pay provisions of the FLSA. Accordingly, in the 2004 Final Rule, the Department excluded workers in agriculture and certain transportation occupations from

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the Hours and Earnings Effects of Expanded Coverage. RAND Labor and Population.

[264] 69 FR 22196–22209 (Apr. 23, 2004).

[265] Table A2 lists the probability codes by occupation used to estimate exemption status.

[266] To match 1990 Census Codes to the corresponding 2000 Census Codes see: *http://www.census.gov/people/io/methodology/*. To translate the 2000 Census Codes into the 2002 Census Codes each code is multiplied by 10.

[267] Beginning January 2011, the MORG data use the 2010 Census Codes. The Department translates these codes into the equivalent 2002 Census Codes to create continuity. The crosswalk is available at: *http://www.census.gov/people/io/methodology/*.

[268] Also included are all workers who are in occupational categories associated with named occupations.

[269] A gamma distribution is a general type of statistical distribution that is based on two parameters, in this case alpha and beta. The gamma distribution was chosen because during the 2004 revision it fit the data the best of the non-linear distributions considered, which included normal, lognormal, and gamma. 69 FR 22204–08.

[270] Since the sample standard deviation is much larger than the standard error, using the sample standard deviation to calculate the shape and location parameters resulted in probabilities that vary more with earnings.

the analysis. The Department now is, in addition, estimating those workers who fall under one of the other exemptions in section 13(a) of the FLSA, because such workers are exempt from both minimum wage and overtime pay under the relevant section and would remain exempt regardless of any changes to the EAP exemption. In fact, many of the workers estimated below as falling within one of the section 13(a) exemptions will already have been excluded from the analysis because they are paid on an hourly basis or are in a blue collar occupation. The methodology for identifying the workers who fall under the section 13(a) exemptions is explained here and is based generally on the methodology the Department used in 1998 when it issued its last report under section 4(d) of the FLSA.

A.2.1 Section 13(a)(1) Outside Sales Workers

Outside sales workers are a subset of the section 13(a)(1) exemptions, but since they are not affected by the salary regulations they are not discussed in detail in the preamble. Outside sales workers are included in occupational category "door-to-door sales workers, news and street vendors, and related workers" (Census code 4950). This category is composed of workers who both would and would not qualify for the outside sales worker exemption; for example, street vendors would not qualify. Therefore, the percentage of these workers that qualify for the exemption was estimated. The Department believes that, under the 1990 Census Codes system, outside sales workers were more or less uniquely identified with occupational category "street & door-to-door sales workers" (277). Therefore, the Department exempts the share of workers in category 4950 who would have been classified as code 277 (43 percent) under the old classification system.

A.2.2 Agricultural Workers

Similar to the 2004 analysis, the Department excluded agricultural workers from the universe of affected employees. In the 2004 Final Rule all workers in agricultural industries were excluded; however, here only workers also in select occupations were excluded since not all workers in agricultural industries qualify for the agricultural overtime pay exemptions. This method better approximates the true number of exempt agricultural workers and provides a more conservative estimate of the number of affected workers. Industry categories include: "crop production" (0170), "animal production" (0180), and "support activities for agriculture and forestry" (0290). Occupational categories include all blue collar occupations (identified with the probability codes), "farm, ranch, and other agricultural managers" (0200), "general and operations managers" (0020), and "first-line supervisors/managers of farming, fishing, and forestry workers" (6000).

A.2.3 Other Section 13(a) Exemptions

The following methodology relies mainly on CPS MORG data but also incorporates alternative data sources when necessary.

Section 13(a)(3): Seasonal amusement and recreational establishment

Any employee of an amusement or recreational establishment may be exempt from minimum wage and overtime pay if the establishment meets either of the following tests: (a) It operates for seven months or less during any calendar year, or (b) its revenue for the six lowest months of the year is less than one-third of the other six months of such year. Amusement and recreational establishments are defined as "establishments frequented by the public for its amusement or recreation," and "typical examples of such are the concessionaires at amusement parks and beaches."[271] In the CPS MORG data the Department identifies general amusement and recreation in the following industry categories:

- "independent artists, performing arts, spectator sports, and related industries" (8560),
- "museums, art galleries, historical sites, and similar institutions" (8570),
- "bowling centers" (8580),
- "other amusement, gambling, and recreation industries" (8590), and
- "recreational vehicle parks and camps, and rooming and boarding houses" (8670).[272]

The CPS MORG data does not provide information on employers' operating information or revenue. Using Business Employment Dynamics (BED) data, the Department estimated the share of leisure and hospitality employees working for establishments that are closed for at least one quarter a year.[273] Although not technically the same as the FLSA definition of "seasonal," this is the best available approximation of "seasonal" employees. The Department estimated that 2.8 percent of amusement and recreational workers will be exempt.

The 1998 section 4(d) report estimated the number of exempt workers by applying an estimate determined in 1987 by a detailed report from the Employment Standards Administration. The Department chose not to use this estimate because it is outdated.

Section 13(a)(3) also exempts employees of seasonal religious or non-profit educational centers, but many of these workers have already been excluded from the analysis either as religious workers (not covered by the FLSA) or as teachers (professional exemption) and so are not estimated.

Section 13(a)(5): Fishermen

Any employee, such as a fisherman, employed in the catching, harvesting, or farming of fish or other aquatic life forms, is exempt from minimum wage and overtime pay. Fishermen are identified in occupational categories "fishers and related fishing workers" (6100) and "ship and boat captains and operators" (9310) and the industry category "fishing, hunting, and trapping" (0280). Workers identified in both these occupational and industry categories are considered exempt.

Section 13(a)(8): Small, local newspapers

This exemption from minimum wage and overtime pay applies to any employee employed by a newspaper with circulation of less than 4,000 and circulated mainly within the county where published. Newspaper employees are identified in the following occupational categories:

- "news analysts, reporters and correspondents" (2810),
- "editors" (2830),
- "technical writers" (2840),
- "writers and authors" (2850), and
- "miscellaneous media and communication workers" (2860).

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[271] § 779.385.

[272] The Department does not believe that all employees in this industry category would qualify for this exemption. However, we had no way to segregate in the data employees who would and would not qualify for exemption.

[273] Seasonal employment was calculated by taking the difference in employment between establishment openings (all establishments that are either opening for the first time or reopening) and establishment births (establishments that are opening for the first time)—resulting in employment in only establishments reopening. Similarly, seasonal employment was estimated by taking the difference in employment between establishment closings and establishment deaths. These two estimates were then averaged. The analysis is limited to the leisure and hospitality industry. Since the exemption is limited to workers in "establishments frequented by the public for its amusement or recreation" the Department must assume the rate of employment in seasonal establishments, relative to all establishments, is equivalent across these amusement or recreation establishments and all leisure and hospitality establishments.

The exemption is limited to the industry category "newspaper publishers" (6470). To limit the exemption to small, local papers, the Department limits the exemption to employees in rural areas. Although employment in a rural area is not synonymous with employment at a small newspaper, this is the best approach currently available. Alternatively, the Department could use data from Dun and Bradstreet (D&B) as was done in the 1998 section 4(d) report. This data would provide information on which establishments are in rural areas; from this the Department could estimate the share of employment in rural areas. This approach would be much more time intensive but would not necessarily provide a better result.

Section 13(a)(10): Switchboard operators

An independently owned public telephone company that has not more than 750 stations may claim the minimum wage and overtime pay exemption for its switchboard operators. "Switchboard operators, including answering service", are exempt under occupation code 5010 and industry classifications "wired telecommunications carriers" (6680) and "other telecommunications carriers" (6690). Using the 2012 Economic Census, the Department estimated that 1.6 percent of employees in the telecommunication industry (NAICS 517) are employed by firms with fewer than ten employees (the estimated level of employment necessary to service seven hundred and fifty stations). According to the 1998 section 4(d) report, fewer than 10,000 workers were exempt in 1987 and so at that time the Department did not develop a methodology for estimating the number exempt.

Section 13(a)(12): Seamen on foreign vessels

Any employee employed as a seaman on a vessel other than an American vessel is exempt from minimum wage and overtime pay. Seamen are identified by occupational categories:

- "sailors and marine oilers" (9300),
- "ship and boat captains and operators" (9310), and
- "ship engineers" (9570).

The CPS MORG data do not identify whether the vessel is foreign or domestic. The best approach the Department has devised is to assume that the number of workers in the occupation "deep sea foreign transportation of freight" (SIC 441) in 2000 is roughly equivalent to the number of workers on foreign vessels.[274] The 2001 Occupational Employment Statistics estimates there were 13,290 workers in this occupation and thus that number of seamen are assigned exempt status on a random basis.

Section 13(a)(15): Companions

Domestic service workers employed to provide "companionship services" for an elderly person or a person with an illness, injury, or disability are not required to be paid the minimum wage or overtime pay. Companions are classified under occupational categories:

- "nursing, psychiatric, and home health aides" (3600) and
- "personal and home care aides" (4610).

And industry categories:

- "home health care services" (8170),
- "individual and family services" (8370), and
- "private households" (9290).

All the workers who fall within these occupational and industry categories were previously excluded from the analysis because they are in occupations where workers have no likelihood of qualifying for the section 13(a)(1) exemption.

Section 13(a)(16): Criminal investigators

The criminal investigator must be employed by the federal government and paid "availability pay."[275] Criminal investigators are identified in occupational categories:

- "detectives and criminal investigators" (3820),
- "fish and game wardens" (3830), and
- "private detectives and investigators" (3910).

This exemption was not mentioned in the 1998 section 4(d) report. The Department exempts all workers in the occupations identified above and employed by the federal government (PEIO1COW value equal to one).

Section 13(a)(17): Computer workers

Computer workers who meet the duties test are exempt under two sections of the FLSA. Salaried computer workers who earn a weekly salary of not less than $455 are exempt under section 13(a)(1) and computer workers who are paid hourly are exempt under section 13(a)(17) if they earn at least $27.63 an hour. Occupations that may be considered exempt include: "Computer and information systems managers" (110), "computer scientists and systems analysts" (1000), "computer programmers" (1010), "computer software engineers" (1020), "computer support specialists" (1040), "database administrators" (1060), "network and computer systems administrators" (1100), "network systems and data communications analysts" (1110), "computer operators" (5800), and "computer control programmers and operators" (7900).

To identify computer workers exempt under section 13(a)(17), the Department restricts the population to workers who are paid on an hourly basis and who earn at least $27.63 per hour. To determine which of these workers pass the computer duties test, we use the probabilities of exemption assigned to these occupations by the Department and assume a linear relationship between earnings and exemption status. Note that none of these workers are impacted by the rulemaking because they are paid on an hourly basis.

A.2.4 Section 13(b) Exemptions

Section 13(b)(1): Motor carrier employees

This exemption eliminated overtime pay for "any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 31502 of Title 49."[276] In essence, these are motor carrier workers, identified by industry category "truck transportation" (6170).

To be exempt, these workers must engage in "safety affecting activities." Examples of exempt occupations include: "driver, driver's helper, loader, or mechanic."[277] The relevant occupational categories are:

- "electronic equipment installers and repairers, motor vehicles" (7110),
- "automotive service technicians and mechanics" (7200),
- "bus and truck mechanics and diesel engine specialists" (7210),
- "heavy vehicle and mobile equipment service technicians and mechanics" (7220), and
- "driver/sales workers and truck drivers" (9130).[278]

Section 13(b)(2): Rail carrier employees

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[274] The SIC classification system has been replaced with NAICS; thus, more recent data are not available.

[275] Availability pay is compensation for hours when the agent must be available to perform work over and above the standard 40 hours per week. *See http://www.opm.gov/oca/pay/HTML/AP.HTM.*

[276] 49 U.S.C. 31502. The text of the law is available at: *http://www.gpo.gov/fdsys/pkg/USCODE-2011-title49/html/USCODE-2011-title49-subtitleVI-partB-chap315-sec31502.htm.*

[277] Fact Sheet #19: The Motor Carrier Exemption under the Fair Labor Standards Act (FLSA).

[278] The 2004 methodology used 1990 Census codes 505, 507, and 804 which crosswalk to these occupations. However, occupations 605, 613, and 914 (included in the 1990 Census code 804) were excluded because under the new classification system they were deemed irrelevant.

Section 13(b)(2) exempts "any employee of an employer engaged in the operation of a rail carrier subject to part A of subtitle IV of Title 49." [279] This includes industrial category "rail transportation" (6080). The 1998 methodology did not include occupational requirements but the 2004 methodology did, so this restriction was included. Occupations are limited to:

- "locomotive engineers and operators" (9200),
- "railroad brake, signal, and switch operators" (9230),
- "railroad conductors and yardmasters" (9240), and
- "subway, streetcar, and other rail transportation workers" (9260).

Section 13(b)(3): Air carrier employees

This section exempts employees subject to the "provisions of title II of the Railway Labor Act." [280] In essence, this exempts air carrier employees, identified by industry category "air transportation" (6070). The 1998 methodology did not include occupational requirements but the 2004 methodology did, so this restriction was included. Occupations are limited to "aircraft pilots and flight engineers" (9030) and "aircraft mechanics and service technicians" (7140).

Section 13(b)(6): Seamen

Occupational categories include "sailors and marine oilers" (9300), "ship and boat captains and operators" (9310), and "ship engineers" (9570).[281] The exemption is limited to the "water transportation" industry (6090).

Section 13(b)(10): Salesmen, partsmen, or mechanics

The Department limited this exemption to workers employed in a "nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." Industry classifications include: "automobile dealers" (4670) and "other motor vehicle dealers" (4680). In the 2004 Final Rule, the industry was limited to 1990 Census code 612 which became Census code "automobile dealers" (4670). Category 4680 ("other motor vehicle dealers") is also included here in keeping with the 1998 section 4(d) report methodology.

The 1998 methodology did not include an occupational restriction; however, the 2004 methodology limited the exemption to automobiles, trucks, or farm implement sales workers and mechanics.

Automobiles, trucks, or farm implement sales workers include:

- "parts salespersons" (4750), and
- "retail salespersons" (4760).[282]

Mechanics include:

- "electronic equipment installers and repairers, motor vehicles" (7110),
- "automotive body and related repairers" (7150),
- "automotive glass installers and repairers" (7160),
- "automotive service technicians and mechanics" (7200),
- "bus and truck mechanics and diesel engine specialists" (7210),
- "heavy vehicle and mobile equipment service technicians and mechanics" (7220),
- "small engine mechanics" (7240), and
- "miscellaneous vehicle and mobile equipment mechanics, installers, and repairers" (7260).[283]

TABLE A2—PROBABILITY CODES BY OCCUPATION

2002 Census code	Occupation	Probability code
10	Chief executives	1
20	General and operations managers	1
40	Advertising and promotions managers	1
50	Marketing and sales managers	1
60	Public relations managers	2
100	Administrative services managers	1
110	Computer and information systems managers	1
120	Financial managers	1
130	Human resources managers	1
140	Industrial production managers	1
150	Purchasing managers	1
160	Transportation, storage, and distribution managers	1
200	Farm, ranch, and other agricultural managers	3
210	Farmers and ranchers	0
220	Construction managers	1
230	Education administrators	1
300	Engineering managers	1
310	Food service managers	3
320	Funeral directors	2
330	Gaming managers	2
340	Lodging managers	3
350	Medical and health services managers	1
360	Natural sciences managers	1
400	Postmasters and mail superintendents	0
410	Property, real estate, and community association managers	3
420	Social and community service managers	1
430	Managers, all other	1
500	Agents and business managers of artists, performers, and athletes	2

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[279] 49 U.S.C. 10101–11908. Text of the law is available at: *http://www.gpo.gov/fdsys/pkg/USCODE-2013-title49/pdf/USCODE-2013-title49-subtitleIV-partA.pdf.*

[280] 45 U.S.C. 181 *et seq.* Available at: *http://www.gpo.gov/fdsys/pkg/USCODE-2013-title45/html/USCODE-2013-title45-chap8-subchapII.htm.*

[281] The 2004 methodology used 1990 Census codes 828, 829, and 833 which crosswalk to these occupations. However, occupation 952 (dredge, excavating, and loading machine operators) was excluded because under the new classification system it was deemed irrelevant.

[282] The 2004 methodology used codes 263 and 269 which crosswalk to these codes plus a few others which have been deemed irrelevant and excluded (4700, 4740, and 4850).

[283] The 2004 methodology used codes 505, 506, 507, and 514 which generally crosswalk to these codes. A few additional codes were added which were deemed relevant (7240 and 7260).

TABLE A2—PROBABILITY CODES BY OCCUPATION—Continued

2002 Census code	Occupation	Probability code
510	Purchasing agents and buyers, farm products	2
520	Wholesale and retail buyers, except farm products	2
530	Purchasing agents, except wholesale, retail, and farm products	2
540	Claims adjusters, appraisers, examiners, and investigators	2
560	Compliance officers, except agriculture, construction, health and safety, and transportation	3
600	Cost estimators	1
620	Human resources, training, and labor relations specialists	2
700	Logisticians	1
710	Management analysts	2
720	Meeting and convention planners	2
730	Other business operations specialists	2
800	Accountants and auditors	1
810	Appraisers and assessors of real estate	3
820	Budget analysts	2
830	Credit analysts	2
840	Financial analysts	2
850	Personal financial advisors	2
860	Insurance underwriters	1
900	Financial examiners	3
910	Loan counselors and officers	2
930	Tax examiners, collectors, and revenue agents	1
940	Tax preparers	2
950	Financial specialists, all other	2
1000	Computer scientists and systems analysts	1
1010	Computer programmers	2
1020	Computer software engineers	1
1040	Computer support specialists	1
1060	Database administrators	1
1100	Network and computer systems administrators	1
1110	Network systems and data communications analysts	1
1200	Actuaries	1
1210	Mathematicians	1
1220	Operations research analysts	1
1230	Statisticians	1
1240	Miscellaneous mathematical science occupations	1
1300	Architects, except naval	1
1310	Surveyors, cartographers, and photogrammetrists	3
1320	Aerospace engineers	1
1330	Agricultural engineers	1
1340	Biomedical engineers	1
1350	Chemical engineers	1
1360	Civil engineers	1
1400	Computer hardware engineers	1
1410	Electrical and electronic engineers	1
1420	Environmental engineers	1
1430	Industrial engineers, including health and safety	1
1440	Marine engineers and naval architects	1
1450	Materials engineers	1
1460	Mechanical engineers	1
1500	Mining and geological engineers, including mining safety engineers	1
1510	Nuclear engineers	1
1520	Petroleum engineers	1
1530	Engineers, all other	1
1540	Drafters	4
1550	Engineering technicians, except drafters	4
1560	Surveying and mapping technicians	4
1600	Agricultural and food scientists	1
1610	Biological scientists	1
1640	Conservation scientists and foresters	1
1650	Medical scientists	1
1700	Astronomers and physicists	1
1710	Atmospheric and space scientists	1
1720	Chemists and materials scientists	1
1740	Environmental scientists and geoscientists	1
1760	Physical scientists, all other	3
1800	Economists	2
1810	Market and survey researchers	2
1820	Psychologists	1
1830	Sociologists	2
1840	Urban and regional planners	3

TABLE A2—PROBABILITY CODES BY OCCUPATION—Continued

2002 Census code	Occupation	Probability code
1860	Miscellaneous social scientists and related workers	2
1900	Agricultural and food science technicians	4
1910	Biological technicians	4
1920	Chemical technicians	4
1930	Geological and petroleum technicians	4
1940	Nuclear technicians	4
1960	Other life, physical, and social science technicians	4
2000	Counselors	2
2010	Social workers	3
2020	Miscellaneous community and social service specialists	3
2040	Clergy	0
2050	Directors, religious activities and education	0
2060	Religious workers, all other	0
2100	Lawyers	1
2110	Judges, magistrates, and other judicial workers	1
2140	Paralegals and legal assistants	4
2150	Miscellaneous legal support workers	3
2200	Postsecondary teachers	1
2300	Preschool and kindergarten teachers	2
2310	Elementary and middle school teachers	1
2320	Secondary school teachers	1
2330	Special education teachers	1
2340	Other teachers and instructors	1
2400	Archivists, curators, and museum technicians	1
2430	Librarians	1
2440	Library Technicians	4
2540	Teacher assistants	4
2550	Other education, training, and library workers	1
2600	Artists and related workers	2
2630	Designers	1
2700	Actors	1
2710	Producers and directors	1
2720	Athletes, coaches, umpires, and related workers	2
2740	Dancers and choreographers	1
2750	Musicians, singers, and related workers	1
2760	Entertainers and performers, sports and related workers, all other	1
2800	Announcers	2
2810	News analysts, reporters and correspondents	3
2820	Public relations specialists	3
2830	Editors	3
2840	Technical writers	3
2850	Writers and authors	2
2860	Miscellaneous media and communication workers	2
2900	Broadcast and sound engineering technicians and radio operators	4
2910	Photographers	1
2920	Television, video, and motion picture camera operators and editors	2
2960	Media and communication equipment workers, all other	4
3000	Chiropractors	1
3010	Dentists	1
3030	Dietitians and nutritionists	3
3040	Optometrists	1
3050	Pharmacists	1
3060	Physicians and surgeons	1
3110	Physician assistants	2
3120	Podiatrists	1
3130	Registered nurses	1
3140	Audiologists	2
3150	Occupational therapists	3
3160	Physical therapists	2
3200	Radiation therapists	3
3210	Recreational therapists	2
3220	Respiratory therapists	3
3230	Speech-language pathologists	2
3240	Therapists, all other	2
3250	Veterinarians	1
3260	Health diagnosing and treating practitioners, all other	1
3300	Clinical laboratory technologists and technicians	3
3310	Dental hygienists	3
3320	Diagnostic related technologists and technicians	3
3400	Emergency medical technicians and paramedics	3

TABLE A2—PROBABILITY CODES BY OCCUPATION—Continued

2002 Census code	Occupation	Probability code
3410	Health diagnosing and treating practitioner support technicians	4
3500	Licensed practical and licensed vocational nurses	4
3510	Medical records and health information technicians	4
3520	Opticians, dispensing	0
3530	Miscellaneous health technologists and technicians	2
3540	Other healthcare practitioners and technical occupations	3
3600	Nursing, psychiatric, and home health aides	0
3610	Occupational therapist assistants and aides	0
3620	Physical therapist assistants and aides	0
3630	Massage therapists	0
3640	Dental assistants	0
3650	Medical assistants and other healthcare support occupations	4
3700	First-line supervisors/managers of correctional officers	2
3710	First-line supervisors/managers of police and detectives	3
3720	First-line supervisors/managers of fire fighting and prevention workers	3
3730	Supervisors, protective service workers, all other	3
3740	Fire fighters	0
3750	Fire inspectors	0
3800	Bailiffs, correctional officers, and jailers	0
3820	Detectives and criminal investigators	0
3830	Fish and game wardens	0
3840	Parking enforcement workers	0
3850	Police and sheriff's patrol officers	0
3860	Transit and railroad police	0
3900	Animal control workers	0
3910	Private detectives and investigators	4
3920	Security guards and gaming surveillance officers	0
3940	Crossing guards	0
3950	Lifeguards and other protective service workers	0
4000	Chefs and head cooks	0
4010	First-line supervisors/managers of food preparation and serving workers	3
4020	Cooks	0
4030	Food preparation workers	0
4040	Bartenders	0
4050	Combined food preparation and serving workers, including fast food	0
4060	Counter attendants, cafeteria, food concession, and coffee shop	0
4110	Waiters and waitresses	0
4120	Food servers, nonrestaurant	0
4130	Dining room and cafeteria attendants and bartender helpers	0
4140	Dishwashers	0
4150	Hosts and hostesses, restaurant, lounge, and coffee shop	4
4160	Food preparation and serving related workers, all other	0
4200	First-line supervisors/managers of housekeeping and janitorial workers	4
4210	First-line supervisors/managers of landscaping, lawn service, and groundskeeping workers	3
4220	Janitors and building cleaners	0
4230	Maids and housekeeping cleaners	0
4240	Pest control workers	0
4250	Grounds maintenance workers	0
4300	First-line supervisors/managers of gaming workers	1
4320	First-line supervisors/managers of personal service workers	4
4340	Animal trainers	4
4350	Nonfarm animal caretakers	0
4400	Gaming services workers	0
4410	Motion picture projectionists	0
4420	Ushers, lobby attendants, and ticket takers	0
4430	Miscellaneous entertainment attendants and related workers	0
4460	Funeral service workers	0
4500	Barbers	0
4510	Hairdressers, hairstylists, and cosmetologists	0
4520	Miscellaneous personal appearance workers	0
4530	Baggage porters, bellhops, and concierges	0
4540	Tour and travel guides	0
4550	Transportation attendants	0
4600	Child care workers	0
4610	Personal and home care aides	0
4620	Recreation and fitness workers	2
4640	Residential advisors	0
4650	Personal care and service workers, all other	0
4700	First-line supervisors/managers of retail sales workers	2
4710	First-line supervisors/managers of non-retail sales workers	2

TABLE A2—PROBABILITY CODES BY OCCUPATION—Continued

2002 Census code	Occupation	Probability code
4720	Cashiers	4
4740	Counter and rental clerks	4
4750	Parts salespersons	4
4760	Retail salespersons	4
4800	Advertising sales agents	2
4810	Insurance sales agents	2
4820	Securities, commodities, and financial services sales agents	2
4830	Travel agents	4
4840	Sales representatives, services, all other	3
4850	Sales representatives, wholesale and manufacturing	3
4900	Models, demonstrators, and product promoters	4
4920	Real estate brokers and sales agents	3
4930	Sales engineers	3
4940	Telemarketers	4
4950	Door-to-door sales workers, news and street vendors, and related workers	4
4960	Sales and related workers, all other	3
5000	First-line supervisors/managers of office and administrative support workers	1
5010	Switchboard operators, including answering service	4
5020	Telephone operators	4
5030	Communications equipment operators, all other	4
5100	Bill and account collectors	4
5110	Billing and posting clerks and machine operators	4
5120	Bookkeeping, accounting, and auditing clerks	4
5130	Gaming cage workers	4
5140	Payroll and timekeeping clerks	4
5150	Procurement clerks	4
5160	Tellers	4
5200	Brokerage clerks	4
5210	Correspondence clerks	4
5220	Court, municipal, and license clerks	4
5230	Credit authorizers, checkers, and clerks	3
5240	Customer service representatives	3
5250	Eligibility interviewers, government programs	3
5260	File Clerks	4
5300	Hotel, motel, and resort desk clerks	4
5310	Interviewers, except eligibility and loan	4
5320	Library assistants, clerical	4
5330	Loan interviewers and clerks	3
5340	New accounts clerks	4
5350	Order clerks	4
5360	Human resources assistants, except payroll and timekeeping	4
5400	Receptionists and information clerks	4
5410	Reservation and transportation ticket agents and travel clerks	4
5420	Information and record clerks, all other	4
5500	Cargo and freight agents	4
5510	Couriers and messengers	4
5520	Dispatchers	4
5530	Meter readers, utilities	4
5540	Postal service clerks	4
5550	Postal service mail carriers	4
5560	Postal service mail sorters, processors, and processing machine operators	4
5600	Production, planning, and expediting clerks	4
5610	Shipping, receiving, and traffic clerks	4
5620	Stock clerks and order fillers	0
5630	Weighers, measurers, checkers, and samplers, recordkeeping	4
5700	Secretaries and administrative assistants	4
5800	Computer operators	4
5810	Data entry keyers	4
5820	Word processors and typists	4
5830	Desktop publishers	4
5840	Insurance claims and policy processing clerks	3
5850	Mail clerks and mail machine operators, except postal service	4
5860	Office clerks, general	4
5900	Office machine operators, except computer	4
5910	Proofreaders and copy markers	4
5920	Statistical assistants	4
5930	Office and administrative support workers, all other	4
6000	First-line supervisors/managers of farming, fishing, and forestry workers	4
6010	Agricultural inspectors	3
6020	Animal breeders	3

TABLE A2—PROBABILITY CODES BY OCCUPATION—Continued

2002 Census code	Occupation	Probability code
6040	Graders and sorters, agricultural products	0
6050	Miscellaneous agricultural workers	0
6100	Fishers and related fishing workers	0
6110	Hunters and trappers	0
6120	Forest and conservation workers	0
6130	Logging workers	0
6200	First-line supervisors/managers of construction trades and extraction workers	4
6210	Boilermakers	0
6220	Brickmasons, blockmasons, and stonemasons	0
6230	Carpenters	0
6240	Carpet, floor, and tile installers and finishers	0
6250	Cement masons, concrete finishers, and terrazzo workers	0
6260	Construction laborers	0
6300	Paving, surfacing, and tamping equipment operators	0
6310	Pile-driver operators	0
6320	Operating engineers and other construction equipment operators	0
6330	Drywall installers, ceiling tile installers, and tapers	0
6350	Electricians	0
6360	Glaziers	0
6400	Insulation workers	0
6420	Painters, construction and maintenance	0
6430	Paperhangers	0
6440	Pipelayers, plumbers, pipefitters, and steamfitters	0
6460	Plasterers and stucco masons	0
6500	Reinforcing iron and rebar workers	0
6510	Roofers	0
6520	Sheet metal workers	0
6530	Structural iron and steel workers	0
6600	Helpers, construction trades	0
6660	Construction and building inspectors	3
6700	Elevator installers and repairers	0
6710	Fence erectors	0
6720	Hazardous materials removal workers	0
6730	Highway maintenance workers	0
6740	Rail-track laying and maintenance equipment operators	0
6750	Septic tank servicers and sewer pipe cleaners	0
6760	Miscellaneous construction and related workers	0
6800	Derrick, rotary drill, and service unit operators, oil, gas, and mining	0
6820	Earth drillers, except oil and gas	0
6830	Explosives workers, ordnance handling experts, and blasters	0
6840	Mining machine operators	0
6910	Roof bolters, mining	0
6920	Roustabouts, oil and gas	0
6930	Helpers—extraction workers	0
6940	Other extraction workers	0
7000	First-line supervisors/managers of mechanics, installers, and repairers	3
7010	Computer, automated teller, and office machine repairers	0
7020	Radio and telecommunications equipment installers and repairers	0
7030	Avionics technicians	0
7040	Electric motor, power tool, and related repairers	0
7050	Electrical and electronics installers and repairers, transportation equipment	0
7100	Electrical and electronics repairers, industrial and utility	0
7110	Electronic equipment installers and repairers, motor vehicles	0
7120	Electronic home entertainment equipment installers and repairers	0
7130	Security and fire alarm systems installers	0
7140	Aircraft mechanics and service technicians	0
7150	Automotive body and related repairers	0
7160	Automotive glass installers and repairers	0
7200	Automotive service technicians and mechanics	0
7210	Bus and truck mechanics and diesel engine specialists	0
7220	Heavy vehicle and mobile equipment service technicians and mechanics	0
7240	Small engine mechanics	0
7260	Miscellaneous vehicle and mobile equipment mechanics, installers, and repairers	0
7300	Control and valve installers and repairers	0
7310	Heating, air conditioning, and refrigeration mechanics and installers	0
7320	Home appliance repairers	0
7330	Industrial and refractory machinery mechanics	0
7340	Maintenance and repair workers, general	0
7350	Maintenance workers, machinery	0
7360	Millwrights	0

TABLE A2—PROBABILITY CODES BY OCCUPATION—Continued

2002 Census code	Occupation	Probability code
7410	Electrical power-line installers and repairers	0
7420	Telecommunications line installers and repairers	0
7430	Precision instrument and equipment repairers	0
7510	Coin, vending, and amusement machine servicers and repairers	0
7520	Commercial divers	4
7540	Locksmiths and safe repairers	0
7550	Manufactured building and mobile home installers	0
7560	Riggers	0
7600	Signal and track switch repairers	0
7610	Helpers—installation, maintenance, and repair workers	0
7620	Other installation, maintenance, and repair workers	0
7700	First-line supervisors/managers of production and operating workers	3
7710	Aircraft structure, surfaces, rigging, and systems assemblers	0
7720	Electrical, electronics, and electromechanical assemblers	0
7730	Engine and other machine assemblers	0
7740	Structural metal fabricators and fitters	0
7750	Miscellaneous assemblers and fabricators	0
7800	Bakers	0
7810	Butchers and other meat, poultry, and fish processing workers	0
7830	Food and tobacco roasting, baking, and drying machine operators and tenders	0
7840	Food batchmakers	0
7850	Food cooking machine operators and tenders	0
7900	Computer control programmers and operators	4
7920	Extruding and drawing machine setters, operators, and tenders, metal and plastic	0
7930	Forging machine setters, operators, and tenders, metal and plastic	0
7940	Rolling machine setters, operators, and tenders, metal and plastic	0
7950	Cutting, punching, and press machine setters, operators, and tenders, metal and plastic	0
7960	Drilling and boring machine tool setters, operators, and tenders, metal and plastic	0
8000	Grinding, lapping, polishing, and buffing machine tool setters, operators, and tenders, metal and plastic	0
8010	Lathe and turning machine tool setters, operators, and tenders, metal and plastic	0
8020	Milling and planing machine setters, operators, and tenders, metal and plastic	0
8030	Machinists	0
8040	Metal furnace and kiln operators and tenders	0
8060	Model makers and patternmakers, metal and plastic	0
8100	Molders and molding machine setters, operators, and tenders, metal and plastic	0
8120	Multiple machine tool setters, operators, and tenders, metal and plastic	0
8130	Tool and die makers	0
8140	Welding, soldering, and brazing workers	0
8150	Heat treating equipment setters, operators, and tenders, metal and plastic	0
8160	Lay-out workers, metal and plastic	0
8200	Plating and coating machine setters, operators, and tenders, metal and plastic	0
8210	Tool grinders, filers, and sharpeners	0
8220	Metalworkers and plastic workers, all other	0
8230	Bookbinders and bindery workers	0
8240	Job printers	0
8250	Prepress technicians and workers	0
8260	Printing machine operators	0
8300	Laundry and dry-cleaning workers	0
8310	Pressers, textile, garment, and related materials	0
8320	Sewing machine operators	0
8330	Shoe and leather workers and repairers	0
8340	Shoe machine operators and tenders	0
8350	Tailors, dressmakers, and sewers	0
8360	Textile bleaching and dyeing machine operators and tenders	0
8400	Textile cutting machine setters, operators, and tenders	0
8410	Textile knitting and weaving machine setters, operators, and tenders	0
8420	Textile winding, twisting, and drawing out machine setters, operators, and tenders	0
8430	Extruding and forming machine setters, operators, and tenders, synthetic and glass fibers	0
8440	Fabric and apparel patternmakers	0
8450	Upholsterers	0
8460	Textile, apparel, and furnishings workers, all other	0
8500	Cabinetmakers and bench carpenters	0
8510	Furniture finishers	0
8520	Model makers and patternmakers, wood	0
8530	Sawing machine setters, operators, and tenders, wood	0
8540	Woodworking machine setters, operators, and tenders, except sawing	0
8550	Woodworkers, all other	0
8600	Power plant operators, distributors, and dispatchers	0
8610	Stationary engineers and boiler operators	0
8620	Water and liquid waste treatment plant and system operators	0

TABLE A2—PROBABILITY CODES BY OCCUPATION—Continued

2002 Census code	Occupation	Probability code
8630	Miscellaneous plant and system operators	0
8640	Chemical processing machine setters, operators, and tenders	0
8650	Crushing, grinding, polishing, mixing, and blending workers	0
8710	Cutting workers	0
8720	Extruding, forming, pressing, and compacting machine setters, operators, and tenders	0
8730	Furnace, kiln, oven, drier, and kettle operators and tenders	0
8740	Inspectors, testers, sorters, samplers, and weighers	0
8750	Jewelers and precious stone and metal workers	0
8760	Medical, dental, and ophthalmic laboratory technicians	0
8800	Packaging and filling machine operators and tenders	0
8810	Painting workers	0
8830	Photographic process workers and processing machine operators	0
8840	Semiconductor processors	0
8850	Cementing and gluing machine operators and tenders	0
8860	Cleaning, washing, and metal pickling equipment operators and tenders	0
8900	Cooling and freezing equipment operators and tenders	0
8910	Etchers and engravers	0
8920	Molders, shapers, and casters, except metal and plastic	0
8930	Paper goods machine setters, operators, and tenders	0
8940	Tire builders	0
8950	Helpers—production workers	0
8960	Production workers, all other	0
9000	Supervisors, transportation and material moving workers	3
9030	Aircraft pilots and flight engineers	4
9040	Air traffic controllers and airfield operations specialists	3
9110	Ambulance drivers and attendants, except emergency medical technicians	0
9120	Bus drivers	0
9130	Driver/sales workers and truck drivers	0
9140	Taxi drivers and chauffeurs	0
9150	Motor vehicle operators, all other	0
9200	Locomotive engineers and operators	0
9230	Railroad brake, signal, and switch operators	0
9240	Railroad conductors and yardmasters	0
9260	Subway, streetcar, and other rail transportation workers	0
9300	Sailors and marine oilers	0
9310	Ship and boat captains and operators	0
9570	Ship engineers	4
9340	Bridge and lock tenders	0
9350	Parking lot attendants	0
9360	Service station attendants	0
9410	Transportation inspectors	0
9420	Other transportation workers	0
9500	Conveyor operators and tenders	0
9510	Crane and tower operators	0
9520	Dredge, excavating, and loading machine operators	0
9560	Hoist and winch operators	0
9600	Industrial truck and tractor operators	0
9610	Cleaners of vehicles and equipment	0
9620	Laborers and freight, stock, and material movers, hand	0
9630	Machine feeders and offbearers	0
9640	Packers and packagers, hand	0
9650	Pumping station operators	0
9720	Refuse and recyclable material collectors	0
9730	Shuttle car operators	0
9740	Tank car, truck, and ship loaders	0
9750	Material moving workers, all other	0

Appendix B. Additional Tables

Table B1—Estimated Number of Potentially Affected EAP Workers With the Current and Updated Salary Levels, by Detailed Industry, Projected for FY2017

Industry	Potentially affected EAP workers (millions) [a]	Not-affected (millions) [b]	Affected (millions) [c]	Affected as share of potentially affected (percent)
Total [d]	22.5	18.3	4.2	19
Agriculture	0.0	0.0	0.0	19
Forestry, logging, fishing, hunting, and trapping	0.0	0.0	0.0	6
Mining	0.2	0.2	0.0	10
Construction	0.8	0.7	0.1	16
Nonmetallic mineral product manufacturing	0.1	0.1	0.0	11
Primary metals and fabricated metal products	0.2	0.2	0.0	13
Machinery manufacturing	0.3	0.3	0.0	10
Computer and electronic product manufacturing	0.6	0.5	0.0	8
Electrical equipment, appliance manufacturing	0.1	0.1	0.0	9
Transportation equipment manufacturing	0.6	0.5	0.0	8
Wood products	0.0	0.0	0.0	18
Furniture and fixtures manufacturing	0.0	0.0	0.0	19
Miscellaneous and not specified manufacturing	0.3	0.3	0.0	14
Food manufacturing	0.2	0.1	0.0	17
Beverage and tobacco products	0.1	0.1	0.0	9
Textile, apparel, and leather manufacturing	0.1	0.1	0.0	19
Paper and printing	0.1	0.1	0.0	20
Petroleum and coal products manufacturing	0.1	0.1	0.0	9
Chemical manufacturing	0.4	0.4	0.0	9
Plastics and rubber products	0.1	0.1	0.0	15
Wholesale trade	0.8	0.7	0.1	17
Retail trade	1.6	1.2	0.4	26
Transportation and warehousing	0.5	0.4	0.1	20
Utilities	0.3	0.2	0.0	11
Publishing industries (except internet)	0.2	0.2	0.0	15
Motion picture and sound recording	0.0	0.0	0.0	54
Broadcasting (except internet)	0.2	0.1	0.0	21
Internet publishing and broadcasting	0.1	0.0	0.0	10
Telecommunications	0.4	0.3	0.0	13
Internet service providers and data processing services	0.0	0.0	0.0	20
Other information services	0.1	0.0	0.0	31
Finance	2.0	1.7	0.3	14
Insurance	1.1	0.9	0.2	19
Real estate	0.3	0.3	0.1	24
Rental and leasing services	0.1	0.0	0.0	26
Professional and technical services	4.0	3.5	0.5	13
Management of companies and enterprises	0.1	0.1	0.0	24
Administrative and support services	0.5	0.4	0.1	26
Waste management and remediation services	0.1	0.0	0.0	23
Educational services	0.9	0.7	0.2	26
Hospitals	1.1	0.9	0.2	22
Health care services, except hospitals	1.3	1.0	0.3	25
Social assistance	0.4	0.2	0.2	38
Arts, entertainment, and recreation	0.4	0.3	0.1	33
Accommodation	0.1	0.1	0.0	21
Food services and drinking places	0.3	0.2	0.1	30
Repair and maintenance	0.1	0.1	0.0	35
Personal and laundry services	0.1	0.0	0.0	37
Membership associations and organizations	0.4	0.3	0.1	29
Private households	0.0	0.0	0.0	21
Public administration	0.8	0.6	0.2	24

Note: Pooled data for FY2013 through FY2015.

[a] Workers who are white collar, salaried, not eligible for another (non-EAP) overtime exemption, and not in a named occupation.

[b] Workers who continue to be exempt after the increases in the salary levels (assuming affected workers' weekly earnings do not increase to the new salary level).

[c] Estimated number of workers exempt under the EAP exemptions who would be entitled to overtime protection under the updated salary levels (if their weekly earnings do not increase to the new salary levels).

[d] Columns may not sum to total due to rounding.

VII. Final Regulatory Flexibility Analysis (FRFA)

The Regulatory Flexibility Act of 1980 (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), hereafter jointly referred to as the RFA, requires that an agency prepare an initial regulatory flexibility analysis (IRFA) when proposing and a final regulatory flexibility analysis (FRFA) when issuing regulations that will have a significant economic impact on a substantial number of small entities. The agency is also required to respond to public comment on the NPRM. *See* 5 U.S.C. 604. If the rule is not expected to have a significant economic impact on a substantial number of small entities, the RFA allows an agency to certify such, in lieu of preparing an analysis. *See* 5 U.S.C. 605. The Chief Counsel for Advocacy of the Small Business Administration was notified of this Final Rule upon submission of the rule to OMB under E.O. 12866.

Based on commenters' concerns that the IRFA did not clearly explain the Department's analysis of costs and payroll increases for small businesses, the Department reorganized and expanded on our analysis from that included in the NPRM. Commenters also requested that the Department include more detailed industry-specific information. In response, the Department has expanded the industry breakdown to the Census's 51 industries categorization. The Department was not able to provide more granular data due to small sample sizes causing imprecise estimates.

TABLE 36—OVERVIEW OF COSTS TO SMALL BUSINESSES, ALL EMPLOYEES AT ESTABLISHMENT AFFECTED METHODOLOGY

Small business costs	Cost
Direct and Payroll Costs	
Average total cost per affected entity [a]	$3,265.
Range of total costs per affected entity [a]	$847–$75,059.
Average percent of revenue per affected entity [a]	0.17%.
Average percent of payroll per affected entity [a]	0.87%.
Average percent of small business profit	0.14%.
Direct Costs	
Regulatory familiarization:	
Time (first year)	1 hour per establishment.
Time (update years)	5 minutes per establishment.
Hourly wage	$36.22.
Adjustment:	
Time (first year affected)	75 minutes per newly affected worker.
Hourly wage	$36.22.
Managerial:	
Time (weekly)	5 minutes per affected worker.
Hourly wage	$42.31.
Payroll Increases	
Average payroll increase per affected entity [a]	$2,516.
Range of payroll increases per affected entity [a]	$647–$54,430.

[a] Using the methodology where all employees at an affected small firm are affected. This assumption generates upper-end estimates. Lower-end cost estimates are significantly smaller.

A. Objectives of, and Need for, the Final Rule

The Fair Labor Standards Act (FLSA) requires covered employers to: (1) Pay employees who are covered and not exempt from the Act's requirements not less than the Federal minimum wage for all hours worked and overtime premium pay at a rate of not less than one and one-half times the employee's regular rate of pay for all hours worked over 40 in a workweek, and (2) make, keep, and preserve records of the persons employed by the employer and of the wages, hours, and other conditions and practices of employment. It is widely recognized that the general requirement that employers pay a premium rate of pay for all hours worked over 40 in a workweek is a cornerstone of the Act, grounded in two policy objectives. The first is to spread employment (or in other words, reduce involuntary unemployment) by incentivizing employers to hire more employees rather than requiring existing employees to work longer hours. The second policy objective is to reduce overwork and its detrimental effect on the health and well-being of workers.

The FLSA provides a number of exemptions from the Act's minimum wage and overtime pay provisions, including one for bona fide executive, administrative, and professional (EAP) employees. Such employees typically receive more monetary and non-monetary benefits than most blue collar and lower-level office workers. The exemption applies to employees employed in a bona fide executive, administrative, or professional capacity and for outside sales employees, as those terms are "defined and delimited" by the Department. 29 U.S.C. 213(a)(1). The Department's regulations implementing these "white collar" exemptions are codified at 29 CFR part 541.

For an employer to exclude an employee from minimum wage and overtime protection pursuant to the EAP exemption, the employee generally must meet three criteria: (1) The employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the "salary basis test"); (2) the amount of salary paid must meet a minimum specified amount (the "salary level test"); and (3) the employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (the "duties test"). The salary level requirement was created to identify the dividing line distinguishing workers who may be performing exempt duties from the nonexempt workers whom Congress intended to be protected by the FLSA's minimum wage and overtime provisions. Throughout the regulatory history of the FLSA, the Department has considered the salary level test the "best single test" of exempt status. Stein Report at 19. This bright-line test is easily observed, objective, and clear. *Id.*

The Department has periodically updated the regulations governing these tests since the FLSA's enactment in 1938, most recently in 2004 when, among other revisions, the Department created the standard duties test and paired it with a salary level test of $455 per week. As a result of inflation, the real value of the salary threshold has fallen significantly since its last update, making it inconsistent with Congress' intent to exempt only "bona fide" EAP workers.

The standard salary level and the total compensation level required for highly compensated employees (HCE) have not been updated since 2004. As a result, the standard salary level has declined considerably in real terms relative to both its 2004 and 1975 values (*see* section VI.A.ii.). This is problematic because the exemption now covers workers who were never intended to be within the exemption, removing them from minimum wage and overtime protection. Similarly, the HCE annual compensation requirement is out of date; by the Final Rule's effective date the share of workers earning above $100,000 annually will have more than tripled since it was adopted in 2004. Therefore, the Department believes this rulemaking is necessary in order to restore the effectiveness of these levels.

The Department's primary objective in this rulemaking is to ensure that the revised salary levels will continue to provide a useful and effective test for exemption. The salary levels were designed to operate as a ready guide to assist employers in deciding which employees were more likely to meet the duties tests for the exemptions. If left unchanged, however, the effectiveness of the salary level test as a means of determining exempt status diminishes as employees' wages increase over time.

In order to restore the ability of the standard salary level and the HCE compensation requirements to serve as appropriate bright-line tests between overtime protected employees and those who may be bona fide EAP employees, this rulemaking increases the minimum salary level to come within the exemption from the FLSA minimum wage and overtime requirements as an EAP employee from $455 to the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (currently the South, $913 a week) for the standard test, and from $100,000 to the annualized value of the 90th percentile of weekly earnings of full-time salaried workers nationally ($134,004 per year) for the HCE test. The Department reached the final standard salary and HCE total compensation levels after considering available data on actual salary levels currently being paid in the economy, publishing a proposed rule, reviewing more than 270,000 timely comments, and considering a range of alternatives. In order to ensure that these levels continue to function appropriately in the future, the rule also includes a provision to automatically update these salary levels every three years.

B. The Agency's Response to the Public Comments

Many of the issues raised by small businesses in the public comments received on the proposed rule are described in the preamble and RIA above, which we incorporate herein. Nevertheless, the significant issues raised by representatives of small businesses and the U.S. Small Business Administration's Office of Advocacy (Advocacy) are repeated here.

Most of the comments received concerning small businesses centered on the burden that the proposed salary level would impose on small entities. Some commenters expressed concern that the expected cost increase from the rule would disproportionately affect small entities. For example, the Wisconsin Agri-Business Association stated that the proposed rule's increased labor costs "will be felt most by small businesses" because they do not have the ability to adjust to increased costs "without detriment to their business or the people they employ." Similarly, the Small Business Legislative Council (SBLC) explained that small businesses (and especially new business) tend to operate on very narrow margins, and so such businesses would be disproportionately affected by this rule. Other comments stated more generally that the proposed salary level would impose significant burdens on small businesses. *See, e.g.,* Nebraska Chamber of Commerce and Industry, Northeastern Retail Lumber Association.

Accordingly, many commenters suggested the Department adopt some forms of differential treatment for small entities. The Greater Philadelphia Chamber of Commerce urged that "a lower compensation threshold be extended to small businesses and nonprofits, which can be expected to bear the greatest burden of complying with the proposed rule as presently written." The American Society of Association Executives and the International Association of Lighting Designers stated that the Department "should either set a lower salary level applicable to all employers or set the minimum salary level at a lower percentile of the national average for nonprofit and/or small employers." *See also* American Osteopathic Association; Kentucky Pharmacists Association. The Greene Law Firm recommended excluding from the proposed salary level increase employers that qualify as "small businesses" for their industries according to the North American Industry Classification System (NAICS) codes. The Maine Department of Labor "agree[d] that consideration should not focus on the size of the employer," but, citing the FLSA's coverage principles, stated that "[b]usinesses with low annual dollar volumes should not be held to the same [salary] level as large corporations." Finally, the Association for Enterprise Opportunity, the California Association for Micro Enterprise Opportunity, and Women Impacting Public Policy each requested an exemption for small businesses that fall below the $500,000 per year threshold for enterprise coverage under the FLSA.

Consistent with the history of the part 541 regulations, the Department declines to create a lower salary level requirement for employees employed at small entities, or to exclude such employees from the salary level test entirely. As we noted in 2004, while "the FLSA itself does provide special treatment for small entities under some of its exemptions . . . the FLSA's statutory exemption for white-collar employees in section 13(a)(1) contains no special provision based on size of business," 69 FR 22238. In the 78-year history of the part 541 regulations defining the EAP exemption, the salary level requirements have never varied according to the size or revenue of the employer. *Cf.* Stein Report at 5–6 (rejecting proposals to set varying regional salary levels); *see also* 69 FR 22238 (stating that implementing differing salary levels based on business size industry-by-industry "would present the same insurmountable challenges" as adopting regional or population-based salary levels).

Congress established the threshold for enterprise coverage under the FLSA (not less than $500,000 in annual gross volume of sales made or business done).[284] All employees of an FLSA-covered enterprise are entitled to the FLSA's protection, unless the employee meets the criteria for exemption from the FLSA's minimum wage and/or overtime pay provisions. Employees of firms which are not covered enterprises under the FLSA may still be subject to the FLSA's protections if they are individually engaged in interstate commerce or in the production of goods for interstate commerce, or in any closely-related process or occupation directly essential to such production. Such employees include those who: work in communications or transportation; regularly use the mails, telephones or interstate communication, or keep records of interstate transactions; handle, ship, or receive goods moving in interstate commerce; regularly cross state lines in the course of employment; or work for independent employers who contract to do clerical, custodial, maintenance, or other work for firms engaged in interstate commerce or in the product of goods for interstate commerce. The Department does not have the authority to create an exemption from the FLSA's individual coverage provision.

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[284] The FLSA also applies to certain "named" activities, regardless of the annual dollar volume of

Several small business commenters raised concerns about the impact that the proposed salary level would have on small entities in low-wage regions and industries. *See, e.g.,* Association for Enterprise Opportunity; Credit Union National Association; National Federation of Independent Businesses (NFIB); Society of Independent Gasoline Marketers of America. Kinecta Federal Credit Union stated that "the Department of Labor has clearly failed to adequately consider the potential impact of this rule on small businesses."

The Department recognizes that many small employers operate in low-paying regions or industries, and we have historically accounted for small employers when setting the salary level. *See* Weiss Report at 14–15 (setting the long test salary level for executive employees "slightly lower than might be indicated by the data" in part to avoid excluding "large numbers of the executives of small establishments from the exemption"). This Final Rule is no exception, as the Department is setting the salary level at the 40th percentile of weekly earnings of full-time salaried employees in the lowest-wage Census Region (as opposed to nationally) in part to account for low-wage employers, including small entities. This change from the methodology contained in the NPRM results in a lower standard salary level than proposed. The final standard salary level represents the 20th percentile of likely exempt employees working in small establishments.[285]

The National Small Business Association and several other small business commenters asserted that "[m]any small businesses have no, or very few, non-exempt employees with most workers being salaried professionals or administrative employees. They do not have timekeeping and payroll systems in place that can accommodate the addition of many more non-exempt employees. Thus, the burden of these changes will fall much more heavily on small businesses than on their larger competitors." Similarly, NFIB stated that "small companies typically lack specialized compliance personnel" to adjust to new regulations, forcing business owners to oversee compliance efforts themselves or pay for outside consultation. The Louisiana Small Business Advisory Council similarly stated: "The cost of compliance for small businesses will be much greater than estimated by the DOL. Lots of small businesses have a minimal number of non-exempt employees, with most workers being salaried professionals or administrative employees." Identical or nearly identical "campaign" comments from small businesses also stated that "[s]mall businesses are often not equipped to monitor the activities of their employees in order to regulate their time. Companies with fewer than 20 employees rarely have a dedicated HR department, so the creation of new hourly reporting and tracking requirements are likely to be a much greater burden on these companies that do not currently face them. The result will be confusion and excess cost for individual business owners."

The Department believes that most, if not all, small businesses, like larger businesses, employ a mix of exempt and overtime-protected workers. As such, employers already have policies and systems in place for scheduling workers and monitoring overtime hours worked and the corresponding overtime premium pay. The Department recognizes that the Final Rule will result in the reclassification of some workers of small businesses from exempt to nonexempt, and expects that employers will modify their existing policies and systems to accommodate this change.

NFIB asserted that "the IRFA underestimates compliance costs because it does not take into account business size when estimating the time it takes to read, comprehend and implement the proposed changes." The Louisiana Small Business Advisory Council similarly commented that the Department underestimated adjustment costs, stating that small businesses "do not have timekeeping and payroll systems in place that can accommodate the addition of new, non-exempt employees."

In the Final Rule, the Department has clarified the explanation of our method for estimating the number of affected workers employed by small firms, and the number of small firms affected. The Department also reconsidered its estimate of the number of affected workers who work some overtime and increased in this Final Rule its estimate of affected workers who work overtime to 40 percent, up from 24 percent in the IRFA. Additionally, in response to comments, the Department has increased estimated regulatory familiarization and adjustment costs in the Final Rule.

Because there was insufficient data to estimate the number of affected workers employed by a typical small entity, the Department presented in the IRFA a range of results based on the assumption that only one employee per small firm was affected (the lower bound), and, alternatively, based on the assumption that all employees in a small firm were affected (the upper bound estimate of impacts per small establishment). Assuming the upper bound scenario, that all employees in a firm were affected, the IRFA showed that on average, costs and payroll increases for small affected firms were less than 0.9 percent of payroll and less than 0.2 percent of revenues. The largest impacts were found in the food services and drinking places industry, where costs and payroll increases composed 0.84 percent of revenues. Due to the mix of exempt and overtime-protected workers employed by small businesses, the actual impact in this industry would almost certainly be smaller than shown in this upper bound scenario analysis.

The Department's adjustment cost estimate in the IRFA of one hour per newly affected worker was meant to be an average across all establishments. The Department acknowledges that some small businesses may face higher costs because of this rulemaking; however, since there is no data indicating the magnitude of this cost

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those enterprises. Named enterprises include the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or the mentally ill who reside on the premises; a school for mentally or physically disabled or gifted children; a preschool, an elementary or secondary school, or an institution of higher education (whether operated for profit or not for profit); or an activity of a public agency. 29 U.S.C. 203(s)(1)(B)–(C).

[285] The Department does not know which employees work for small businesses and therefore randomly assigns workers to small businesses.

(compared to other businesses), the Department has not distinguished between establishment sizes in the cost estimates. However, in response to comments, the Department has increased the average adjustment time from one hour to 75 minutes per affected worker and we have added additional time for regulatory familiarization.

The Department received many comments in response to our proposal in the NPRM to automatically update the standard salary and HCE total annual compensation requirements. As discussed in section IV.E.i., some commenters asserted that the automatic updating mechanism introduced in this rulemaking may violate the RFA. For example, Seyfarth Shaw urged the Department to not proceed with automatic updating in part because this mechanism would "effectively bypass" this authority. The Partnership to Protect Workplace Opportunity (PPWO) raised similar RFA concerns and characterized the Department's rulemaking as a "'super-proposal,' deciding once and for all what (in the Department's belief) is best without consideration of its impact now or in the future." PPWO further stated that "it would not be possible for the Department to accurately estimate the impact of the automatic increases in future years as the workforce and the economy are always changing."

The RFA requires a regulatory flexibility analysis to accompany any agency final rule promulgated under 5 U.S.C. 553. *See* 5 U.S.C. 603–604. In accordance with this requirement, this section estimates the future costs of automatic updating using the fixed percentile method. The RFA only requires that such analyses accompany rulemaking, and commenters have not cited any RFA provision that would require the Department to conduct a new regulatory flexibility analysis before each automatic salary level update. In response to PPWO's concern about this rulemaking setting the salary level updating process "once and for all," we reiterate that this Final Rule does not preclude further rulemaking should the Department determine that future conditions indicate that revisions to the salary level updating methodology may be warranted.

Several commenters addressed the potential effects that an annual automatic updating mechanism could have on small entities. Advocacy commented that the Department should analyze the impact of updates on small businesses. The NFIB and the Small Business Legislative Council asserted that annual automatic updates to the standard salary level would create perpetual budgeting uncertainty for small entities, and objected that, under our proposal, small employers would only know the updated salary level 60 days before it takes effect. The Maine Department of Labor asserted that small businesses "lack the budget flexibility to provide annual raises to all exempt workers," while the National Grocers Association and Pizza Properties commented that annual automatic updates might reduce the prevalence or effectiveness of performance-based incentive pay. Several small business commenters, including Alpha Graphics and many individual employers who did not name their organizations, worried that automatic updating would likely "escalate the salary threshold level to an inappropriately high level in a matter of a few years."

Some small business commenters supported the idea of automatic updating, provided the Department make other salary level changes. *See, e.g.,* Board Game Barrister (favoring annual updating using the CPI–U after the new salary level is phased in); Corporate Payroll Services (agreeing that salary level "should be indexed to inflation," but favoring a lower initial salary level); Think Patented (favoring updating using "the Current Population Survey Weekly Earnings Index, *not the CPI–U"*)(emphasis in comment). The Society of Independent Gasoline Marketers of America, which favored a lower salary level in part to protect small business fuel retailers, supported automatically updating the standard salary threshold every three to five years "using a fixed percentile of wages based on data sets that take into account regional and industry wage disparities." *See also* Wisconsin Bankers Association (supporting automatic updates to regionally-adjusted salary level every five years). ANCOR and several non-profit care providers stated that "steadier, more predictable" salary level changes "will likely benefit providers who will be able to adjust to smaller, more frequent changes better than to larger, less frequent ones."

As explained earlier, this Final Rule introduces a mechanism to automatically update the standard salary and HCE total annual compensation thresholds, but with a number of important adjustments from the options considered in the NPRM. First, the Department will update the standard salary level by using regional data—specifically, the 40th percentile of weekly earnings of full-time salaried workers in the lowest wage Census Region—rather than national data. Second, future automatic updates to the standard salary and HCE compensation thresholds will take place every three years, rather than annually. Finally, the Department will publish the updated standard salary and HCE compensation thresholds at least 150 days before they take effect, instead of just 60 days. We believe that these three significant changes appropriately address the concerns raised by small business commenters, while ensuring that the earnings thresholds for the EAP exemption will remain effective and up to date over time. The triennial automatic updating mechanism introduced in this Final Rule should benefit employers of all sizes going forward by avoiding the uncertainty and disruptiveness of larger increases that would likely occur as a result of irregular updates.

C. Comment by the Chief Counsel for Advocacy of the Small Business Administration

SBA's Office of Advocacy (Advocacy) expressed similar concerns as those expressed by other small business commenters, based upon its listening sessions and roundtables regarding the NPRM. Advocacy stated that it was concerned that the IRFA did not properly analyze the numbers of small businesses affected by this regulation and underestimated their compliance costs, and stated that the Department should publish a supplemental IRFA to reanalyze small business impacts. The comment stated that the IRFA "analyzes small entities very broadly, not fully considering how the economic impact affects various categories of small entities differently." The comment emphasized that the Department should not have analyzed industries by general 2- or 3-digit NAICS codes when "more specific data are readily available," and should have evaluated the impact on small non-profits and small governmental jurisdictions. As presented below, the Department revised its analysis in this FRFA to display the impact on industries using 6-digit NAICS codes, rather than the 2- and 3-digit codes, in order to present a more detailed assessment of specific impacts.[286]

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[286] The Department estimates the number of small businesses and their employees using SUSB data and the SBA size standards at the 6-digit NAICS level. The most detailed industry level in the CPS is the 3-digit Census code level (262 industries total), which is considerably less granular than 6-digit NAICS. Moreover, there is not always a clear one-to-one correspondence between the Census and NAICS codes; 3-digit Census industry codes correspond to a mix of 4-digit, 5-digit, and even occasionally partial 6-digit industries. *See https://usa.ipums.org/usa/volii/indcross03.shtml* for a crosswalk between Census industry codes and

Advocacy also stated that the Department should have analyzed and considered the impact of the proposed standard salary level in light of regional and industry differences. As explained in the preamble and in the economic impact analysis, the Final Rule differs from the proposed rule in that it bases the standard salary level on earnings in the lowest-wage Census Region, which is currently the South. This change will provide relief not only to small businesses and others in low-wage industries and regions, but also to small non-profit entities and small governmental jurisdictions. As previously explained, the Department believes that the standard salary level set in this Final Rule effectively distinguishes between employees who are overtime eligible and those who may be bona fide executive, administrative, or professional employees, without necessitating a return to a duties test that sets specific limits on the performance of nonexempt work, like the more detailed "long" duties test that existed before 2004. The new salary level not only accounts for the growth in salaries that has taken place since the salary level was updated in 2004, but also addresses the Department's conclusion that the 2004 salary threshold was set too low in light of that rulemaking's switch to a single duties test that no longer set any specific limits on the performance of nonexempt work. Setting a salary level in this Final Rule significantly below the level proposed by the Department would have required a more rigorous duties test than the current standard duties test in order to effectively distinguish between white collar employees who are overtime protected and those who may be bona fide EAP employees. Commenters representing employers overwhelmingly opposed DOL making changes to the duties test and stated that changes to the duties test are more burdensome for businesses. Further, by adjusting the Final Rule salary level to focus on the lowest-wage Census Region instead of a national level, we have removed the effect of the three higher earnings Census Regions on the salary level, ensuring the salary level is not driven by earnings in high- or even middle-wage regions of the country. We note that the South Census Region—the same region on which the Department relied in setting the salary level in 2004—is comprised of the three lowest-wage Census divisions. The Department believes that the lower standard salary level set in the Final Rule is appropriate for small businesses.

Advocacy also stated that the IRFA underestimated the regulatory familiarization, adjustment, managerial costs, and payroll costs, of the proposed rule on small entities, especially because small entities often have limited or no human resources personnel on staff. As discussed elsewhere in the preamble and the economic impact analysis, the FRFA increases the number of affected workers who work overtime, accounts for additional regulatory familiarization time each year that salary levels are adjusted and accounts for additional adjustment costs by increasing the adjustment time to 75 minutes per affected worker.[287] Moreover, the Department expects that small entities will rely upon compliance assistance materials provided by the Department, including the small entity compliance guide we will publish, or industry associations to become familiar with the Final Rule. Additionally, we note that the Final Rule is quite limited in scope as it primarily makes changes to the salary component of the part 541 regulation, even though the NPRM had raised questions about whether we also should make changes to the duties tests for exemption, which would have required more time to understand. With regard to adjustment costs, as noted above, the Department has increased the number of affected workers who work overtime and increased adjustment costs. The estimated 75 minutes per employee for adjustment costs is an average –allotting the full 75 minutes for the approximately 60 percent of the employees who do not work overtime (Type 1 employees) and those whose salaries are well below the new standard salary level or only occasionally work overtime—even though employers actually will need to spend little to no time considering those workers. This leaves several hours for employers to consider how to respond with regard to other employees. Finally, as previously mentioned, the Department believes that most entities have at least some nonexempt employees and, therefore, already have policies and systems in place for monitoring and recording their hours. We believe that applying those same policies and systems to the workers whose exemption status changes will, on average, not require more than five minutes per week per worker who works overtime in managerial time cost, as employers will rely on policies such as a prohibition against working overtime without express approval or a standard weekly schedule of assigned hours. The Department notes that most affected employees who work overtime do not work large amounts of overtime hours and we therefore do not believe that employers will spend hours managing the time of these employees. Seventy-five percent of currently exempt employees average less than 10 hours of overtime per week. The Department believes that an average of 5 additional minutes per week managing the hours of each newly exempt worker who works overtime is appropriate.

As shown in Table 41, the Department estimates that there will be a range of costs for small entities from this rule, ranging from $847 to $75,059. Advocacy commented that small businesses were concerned that the Department's estimates of compliance costs were neither transparent nor accurate; and that small businesses have told Advocacy that their payroll costs would be significantly more costly than estimated by the Department. The Department does not believe there was sufficient information from small business commenters to determine the accuracy of those higher estimates.

Advocacy also suggested that the Department consider non-financial impacts that it asserted would accrue to small entities, such as the potential for lower employee morale or the loss of scheduling flexibility if employees are converted from salaried to hourly. The Department addresses these and other possible impacts that cannot be quantified in the preamble and economic impact analysis. As explained above, even if an employee is reclassified as nonexempt, there is no requirement that the employer convert the employee's pay status from salaried to hourly. Employers may choose to continue to pay these formerly exempt workers a salary (with the overtime premium for hours in excess of 40 in those weeks when the employee works overtime). In addition, as we noted in the preamble, based on the available research the Department does not believe that workers will experience the significant change in flexibility that some employers envisioned if the employer reclassifies them as nonexempt. *See* section IV.A.iv. The Department believes that while individual experiences vary, the rule would benefit employees in a variety of ways (*e.g.*, through an increased salary, overtime earnings when the employee has to work extra hours, time off).

NAICS. While results can be tabulated at the 3-digit Census level, small sample sizes render statistical inference unreliable.

[287] The estimates of regulatory familiarization and adjustment costs are averages and some small entities may take more or less time to comply with this rule.

Further, a study by Lonnie Golden,[288] referenced by the National Employment Law Project (NELP), found using data from the General Social Survey (GSS) that "[i]n general, salaried workers at the lower (less than $50,000) income levels don't have noticeably greater levels of work flexibility that they would 'lose' if they became more like their hourly counterparts."

Advocacy also expressed concern "that the proposed rule does not count worker bonuses or commissions as part of the salary computation." The Department notes that the Final Rule, for the first time, does modify the salary basis rule to permit employers to count nondiscretionary bonuses and other nondiscretionary incentive payments such as commissions toward up to ten percent of the standard salary level requirement (*see* section IV.C.).

Finally, Advocacy suggested that the Department gradually phase in any changes to the salary level, and provide longer than the four months provided in 2004 for the implementation of the rule, suggesting we provide small businesses up to 12–18 months. As discussed in the preamble, the Department does not believe a phase-in is necessary given that this Final Rule adopts a methodology resulting in a lower salary level than the proposed methodology, and the Department will automatically update the salary level every three years rather than annually as proposed. Further, even though this Final Rule changes only salary-related requirements, unlike the 2004 rule which completely updated part 541 including the duties requirements, the Department is providing more than 180 days of notice to all employers before the Final Rule's effective date of December 1, 2016, and we will provide at least 150 days of notice of future automatic updates to the salary requirement.

C. Description of the Number of Small Entities and Employees to Which the Final Rule Will Apply

i. Definition of Small Entity

The RFA defines a "small entity" as a (1) small not-for-profit organization, (2) small governmental jurisdiction, or (3) small business. The Department used the entity size standards defined by SBA to classify entities as small in effect as of February 26, 2016 for the purpose of this analysis. SBA establishes separate standards for individual 6-digit NAICS industry codes, and standard cutoffs are typically based on either the average number of employees, or the average annual receipts. For example, small businesses are generally defined as having fewer than 500, 1,000, or 1,250 employees in manufacturing industries and less than $7.5 million in average annual receipts for many nonmanufacturing industries. However, some exceptions do exist, the most notable being that depository institutions (including credit unions, commercial banks, and non-commercial banks) are classified by total assets. Small governmental jurisdictions are another noteworthy exception. They are defined as the governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of less than 50,000 people.[289]

ii. Number of Small Entities and Employees

The Department obtained data from several different sources to determine the number of small entities and employment in these entities for each industry. However, the Statistics of U.S. Businesses (SUSB, 2012) was used for most industries. Industries for which the Department used data from alternative sources include credit unions,[290] commercial and non-commercial banks,[291] agriculture,[292] and public administration.[293] The Department used the latest available data in each case, so data years differ between sources.[294]

In the SUSB data, for each industry, the total number of small establishments and employees is organized into categories defined using employment, annual revenue, and assets. The Department combined these categories with the corresponding SBA standards to estimate the proportion of establishments and workers in each industry who are considered small or employed by a small entity. The general methodological approach was to classify all establishments or employees in categories below the SBA cutoff as in "small entity" employment.[295] If a cutoff fell in the middle of a defined category, a uniform distribution of employees across that bracket was assumed in order to determine what proportion should be classified as in small entity employment. The Department assumed that the small entity distribution across revenue categories for other depository institutions, which was not separately represented in FDIC asset data, was similar to that of credit unions. The share of employment estimated as small was applied to the CPS data. This is necessary for estimating affected workers in small entities.

The Department also estimated the number of small establishments by employer type (non-profit, for profit, government). The calculation of number of establishments by employer type is similar to the calculation of number of establishments by industry. However, instead of using SUSB data by industry, the Department used SUSB data by Legal Form of Organization for non-profit and for profits establishments and data from the 2012 Census of Governments for small governments. The 2012 Census of Governments report includes a breakdown of state and local governments by population of their underlying jurisdiction, allowing us to estimate the number of governments that are small. The Department calculated the number of affected small employees from CPS data by tabulating observations where the respondent is both employed by a non-profit/for profit/government entity and is flagged as being employed in a small establishment. However, it should be noted that CPS respondents are flagged as employed in a small business based on their industry and the industry distribution of employment in small firms. Therefore, this methodology assumes the propensity of a business to be small is not correlated with employer type.

iii. Number of Small Entities Impacted by the Final Rule

Table 37 presents the estimated number of establishments and small establishments in the U.S. (Hereafter, the terms "establishment" and "entity" are used interchangeably and are considered equivalent for the purposes of this FRFA.)[296] Based on the methodology described above, the Department found that of the 7.5 million establishments relevant to this analysis, more than 80 percent (6.0 million) are small by SBA standards. These small establishments employ almost 50 million workers, about 37 percent of workers employed by all establishments (excluding self-employed, unpaid workers, and members of the armed forces), and account for roughly a third of total payroll ($2.3 trillion of $6.5 trillion).[297]

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[288] Golden, L. (2014). Flexibility and Overtime Among Hourly and Salaried Workers. Economic Policy Institute.

[289] *See http://www.sba.gov/advocacy/regulatory-flexibility-act* for details.

[290] National Credit Union Association. (2010). 2010 Year End Statistics for Federally Insured Credit Unions.

[291] Federal Depository Insurance Corporation. (2015). Statistics on Depository Institutions—Compare Banks. Available at: *https://www5.fdic.gov/SDI/index.asp.*

[292] United States Department of Agriculture. (2014). 2012 Census of Agriculture: United States Summary and State Data: Volume 1, Geographic Area Series, Part 51. Available at: *http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf.*

[293] Hogue, C. (2012). Government Organization Summary Report: 2012. Available at: *http://www2.census.gov/govs/cog/g12_org.pdf.*

[294] Industry data are not displayed if the sample size of affected workers in small establishments is less than 10.

[295] The SUSB defines employment as of March 12th.

[296] SUSB reports data by size designations where the size designations are based on "enterprises" (a business organization consisting of one or more domestic establishments that were specified under

TABLE 37—NUMBER OF ESTABLISHMENTS AND EMPLOYEES BY SBA SIZE STANDARDS, BY INDUSTRY AND EMPLOYER TYPE

Industry/Employer type	Establishments (1,000s)	Workers (1,000s)[a]				Annual payroll (billions)
		Total	Small	Total	Small business employed	Total
Total	7,514.8	6,049.5	136,307.0	49,768.7	$6,465.8	$2,275.5
Industry						
Agriculture	9.1	8.4	c	c	c	c
Forest., log., fish., hunt., and trap	12.9	12.6	c	c	c	c
Mining	28.9	23.3	1,041.1	420.3	$74.2	$29.6
Construction	652.9	634.3	7,458.5	4,704.7	364.3	229.3
Nonmetallic mineral prod. manuf	15.2	11.7	400.6	192.3	20.1	9.5
Prim. metals and fab. metal prod	60.1	56.4	1,623.1	999.0	80.3	48.7
Machinery manufacturing	24.2	22.1	1,312.5	715.2	73.7	39.1
Computer and elect. prod. manuf	13.2	11.8	1,283.3	598.8	95.4	44.8
Electrical equip., appliance manuf	5.8	5.0	c	c	c	c
Transportation equip. manuf	11.8	10.2	2,340.0	600.1	141.6	34.0
Wood products	13.7	12.6	386.7	260.6	15.6	10.6
Furniture and fixtures manuf	16.3	15.9	380.8	274.7	14.7	10.6
Misc. and not spec. manuf	29.6	28.5	1,355.5	801.2	71.0	41.4
Food manufacturing	25.8	22.7	1,676.7	769.2	65.9	28.3
Beverage and tobacco products	5.1	4.5	279.4	138.3	15.1	7.1
Textile, app., and leather manuf	16.2	15.7	532.8	365.5	21.2	14.1
Paper and printing	32.0	29.8	880.4	491.1	42.0	22.6
Petroleum and coal prod. manuf	2.2	1.2	c	c	c	c
Chemical manufacturing	13.3	10.6	1,316.6	538.3	87.2	34.3
Plastics and rubber products	12.7	10.6	502.0	235.9	23.3	10.6
Wholesale trade	420.5	334.7	3,474.1	1,572.2	184.6	82.5
Retail trade	1,063.8	685.4	15,618.2	5,224.8	520.6	191.1
Transport. and warehousing	214.5	170.7	5,780.1	1,481.6	274.7	65.6
Utilities	17.8	7.6	1,264.6	260.0	81.1	15.8
Publishing ind. (ex. internet)	27.1	20.9	562.0	242.9	33.2	14.0
Motion picture and sound recording	24.9	21.7	332.6	119.4	17.2	6.5
Broadcasting (except internet)	9.6	5.3	580.2	129.1	34.3	7.3
Internet publishing and broadcasting	6.9	5.8	c	c	c	c
Telecommunications	49.2	11.1	961.6	189.1	64.9	12.4
Internet serv. providers and data	14.0	9.2	c	c	c	c
Other information services	3.6	3.1	258.4	75.9	11.5	3.1
Finance	298.2	115.0	4,440.6	689.2	295.9	46.7
Insurance	176.3	137.6	2,613.4	670.4	159.2	40.6
Real estate	295.7	251.5	1,886.0	1,150.2	91.8	55.5
Rental and leasing services	54.0	26.9	374.0	109.7	16.5	4.4
Professional and technical services	859.2	778.9	8,793.5	4,164.1	626.8	288.4
Management of companies and enterprises	52.2	32.2	181.9	55.1	10.0	3.2
Admin. and support services	363.7	310.7	4,905.9	2,186.4	174.7	73.5
Waste manag. and remed. services	23.8	17.8	524.3	209.9	23.7	9.4
Educational services	95.9	84.0	13,615.2	3,008.1	675.4	142.1
Hospitals	6.7	1.6	6,979.2	336.9	384.5	18.9
Health care services, except hospitals	663.8	545.6	10,000.5	4,754.6	424.1	200.8
Social assistance	163.3	133.1	2,829.2	1,567.8	94.9	49.7
Arts, entertainment, and recreation	125.1	115.1	2,591.0	1,255.8	89.0	43.5
Accommodation	64.2	53.7	1,511.1	557.6	50.7	18.7
Food services and drinking places	598.5	470.6	8,534.3	2,315.2	197.2	53.6
Repair and maintenance	211.2	196.4	1,572.6	1,167.9	63.5	45.9
Personal and laundry services	212.7	186.2	1,586.7	1,185.9	46.1	34.4

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common ownership or control). However, the number of enterprises is not reported for the size designations. Instead, SUSB reports the number of "establishments" (individual plants, regardless of ownership) and "firms" (a collection of establishments with a single owner within a given state and industry) associated with enterprises size categories. Therefore, numbers in this analysis are for the number of establishments associated with small enterprises, which may exceed the number of small enterprises. We chose to base the analysis on the number of establishments rather than firms for a more conservative estimate (potential overestimate) of the number of small businesses.

[297] Since information is not available about employer size in the CPS MORG, respondents were randomly assigned as working in a small business based on the SUSB probability of employment in a small business by detailed Census industry. Annual payroll was estimated based on the CPS weekly earnings of workers by industry size.

TABLE 37—NUMBER OF ESTABLISHMENTS AND EMPLOYEES BY SBA SIZE STANDARDS, BY INDUSTRY AND EMPLOYER TYPE—Continued

Industry/Employer type	Establishments (1,000s)	Workers (1,000s)[a]				Annual payroll (billions)
		Total	Small	Total	Small business employed	Total
Membership associations & organizations	307.1	296.3	1,991.2	1,458.7	90.1	65.1
Private households	[b]	[b]	[c]	[c]	[c]	[c]
Public administration[d]	90.1	72.8	7,076.8	689.9	419.4	35.6
Employer Type						
Non-profit, private[e]	566.7	489	9,658.10	3,997.00	472.70	176.10
For profit, private	6,865.10	5,491.30	105,094.30	43,310.80	4,849.50	1,979.40
Government (state and local)	90.1	72.8	17,819.60	2,460.90	896.60	120.00

Note: Establishment data are from the Survey of U.S. Businesses 2012; worker and payroll data from CPS MORG using pooled data for FY2013–FY2015 projected to reflect FY2017.

[a] Excludes the self-employed and unpaid workers.

[b] SUSB does not provide information on private households.

[c] Data not displayed because sample size of affected workers in small establishments is less than 10.

[d] Establishment number represents the total number of governments, including state and local. Data from Government Organization Summary Report: 2012.

[e] As discussed in section VI.B.iii, estimates of workers subject to the FLSA do not exclude workers employed by enterprises that do not meet the enterprise coverage requirements because there is no reliable way of estimating this population. The estimates also do not exclude workers at non-covered enterprises who are not individually covered (because the estimates assume all workers are employed by covered entities). Although not excluding workers who work for non-covered enterprises would only impact a small percentage of workers generally, it may have a larger impact (and result in a larger overestimate) for workers in non-profits because when determining enterprise coverage only revenue derived from business operations, not charitable activities, are included.

iv. Number of Affected Small Entities and Employees

For this Final Rule analysis, to estimate the probability that an exempt EAP worker is employed by a small establishment, the Department assumed this probability is equal to the proportion of all workers employed by small establishments in the corresponding industry. That is, if 50 percent of workers in an industry are employed in small entities, then on average 1 out of every 2 exempt EAP workers in this industry is expected to be employed by a small establishment.[298] The Department applied these probabilities to the population of exempt EAP workers in order to find the number of workers (total exempt EAP workers and total affected by the rule) employed by small entities. No data are available to determine whether small businesses (or small businesses in specific industries) are more or less likely than non-small businesses to employ exempt EAP workers or affected EAP workers. Therefore, the best assumption available is to assign the same rates to all small and non-small businesses.[299]

The Department estimated that 1.6 million of the 4.2 million affected workers (37.1 percent) are employed by small entities (Table 38). This composes about 3.1 percent of the 49.8 million workers employed by small entities. The sectors with the highest total number of affected workers employed by small establishments are: professional and technical services (256,800); health care services, except hospitals (148,900); and retail trade (147,000). The sectors with the largest percent of small business workers who are affected include: management of companies and enterprises (8.9 percent); motion picture and sound recording (7.6 percent); and insurance (7.2 percent).

TABLE 38—NUMBER OF AFFECTED WORKERS EMPLOYED BY SMALL ESTABLISHMENTS, BY INDUSTRY AND EMPLOYER TYPE

Industry	Workers (1,000s)		Affected workers (1,000s)[a]	
	Total	Small business employed	Total	Small business employed
Total	136,307.0	49,768.7	4,227.6	1,567.5
Industry				
Agriculture	[c]	[c]	[c]	[c]
Forest., log., fish., hunt., and trap	[c]	[c]	[c]	[c]

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[298] The Department used CPS microdata to estimate the number of affected workers. This was done individually for each observation in the relevant sample by randomly assigning them a small business status based on the best available estimate of the probability of a worker to be employed in a small business in their respective industry (3-digit Census codes). While aggregation to the 262 3-digit Census codes is certainly possible, over half of these industry codes contain 7 or fewer observations, including one fifth that have one or zero observations. The Department does not consider any breakdowns based on these numbers reliable.

[299] There is a strand of literature that indicates that small establishments tend to pay lower wages than larger establishments. This may imply that workers in small businesses are more likely to be affected than workers in large businesses; however, the literature does not make clear what the appropriate alternative rate for small businesses should be.

TABLE 38—NUMBER OF AFFECTED WORKERS EMPLOYED BY SMALL ESTABLISHMENTS, BY INDUSTRY AND EMPLOYER TYPE—Continued

Industry	Workers (1,000s)		Affected workers (1,000s) [a]	
	Total	Small business employed	Total	Small business employed
Mining	1,041.1	420.3	21.8	11.8
Construction	7,458.5	4,704.7	127.3	83.1
Nonmetallic mineral prod. manuf	400.6	192.3	7.1	3.9
Prim. metals and fab. metal prod	1,623.1	999.0	29.5	18.1
Machinery manufacturing	1,312.5	715.2	32.1	17.4
Computer and elect. prod. manuf	1,283.3	598.8	47.9	22.1
Electrical equip., appliance manuf	[c]	[c]	[c]	[c]
Transportation equip. manuf	2,340.0	600.1	47.9	14.0
Wood products	386.7	260.6	7.0	4.8
Furniture and fixtures manuf	380.8	274.7	7.9	5.6
Misc. and not spec. manuf	1,355.5	801.2	44.4	26.9
Food manufacturing	1,676.7	769.2	27.5	13.1
Beverage and tobacco products	279.4	138.3	5.9	2.8
Textile, app., and leather manuf	532.8	365.5	16.1	10.4
Paper and printing	880.4	491.1	25.8	14.3
Petroleum and coal prod. manuf	[c]	[c]	[c]	[c]
Chemical manufacturing	1,316.6	538.3	37.7	12.7
Plastics and rubber products	502.0	235.9	12.1	6.5
Wholesale trade	3,474.1	1,572.2	144.5	62.1
Retail trade	15,618.2	5,224.8	417.9	147.0
Transport. and warehousing	5,780.1	1,481.6	101.8	23.3
Utilities	1,264.6	260.0	31.1	6.9
Publishing ind. (ex. internet)	562.0	242.9	32.3	14.7
Motion picture and sound recording	332.6	119.4	22.6	9.1
Broadcasting (except internet)	580.2	129.1	38.5	8.2
Internet publishing and broadcasting	[c]	[c]	[c]	[c]
Telecommunications	961.6	189.1	44.7	7.7
Internet serv. providers and data	[c]	[c]	[c]	[c]
Other information services	258.4	75.9	21.4	4.0
Finance	4,440.6	689.2	277.0	46.3
Insurance	2,613.4	670.4	199.3	48.3
Real estate	1,886.0	1,150.2	78.4	44.9
Rental and leasing services	374.0	109.7	15.9	5.1
Professional and technical services	8,793.5	4,164.1	538.1	256.8
Management of companies and enterprises	181.9	55.1	16.3	4.9
Admin. and support services	4,905.9	2,186.4	136.9	49.7
Waste manag. and remed. services	524.3	209.9	12.8	5.9
Educational services	13,615.2	3,008.1	230.2	44.0
Hospitals	6,979.2	336.9	241.5	13.2
Health care services, except hospitals	10,000.5	4,754.6	329.3	148.9
Social assistance	2,829.2	1,567.8	155.2	91.5
Arts, entertainment, and recreation	2,591.0	1,255.8	124.4	66.9
Accommodation	1,511.1	557.6	26.6	11.5
Food services and drinking places	8,534.3	2,315.2	84.0	26.1
Repair and maintenance	1,572.6	1,167.9	36.0	27.3
Personal and laundry services	1,586.7	1,185.9	23.0	16.3
Membership associations & organizations	1,991.2	1,458.7	115.8	84.5
Private households	[c]	[c]	[c]	[c]
Public administration (d)	7,076.8	689.9	201.4	16.5
Employer Type				
Non-profit, private (e)	9,658.10	3,997.00	456.2	216.2
For profit, private	105,094.30	43,310.80	3,308.80	1,306.80
Government (state and local)	17,819.60	2,460.90	451.7	44.5

Note: Establishment data are from the Survey of U.S. Businesses 2012; worker data are from CPS MORG using pooled data for FY2013–FY2015 projected to reflect FY2017.

[a] Estimation of affected workers employed by small establishments was done at the Census 4-digit occupational code and industry level. Therefore, at the more aggregated 51 industry level shown in this table, the ratio of small business employed to total employed does not equal to the ratio of affected small business employed to total affected for each industry, nor does it equal the ratio for the national total because relative industry size, employment, and small business employment differs from industry to industry.

[b] Establishment number represents the total number of governments, including state and local.

[c] Data not displayed because sample size of affected workers in small establishments is less than 10.

[e] As discussed in section VI.B.iii, estimates of workers subject to the FLSA do not exclude workers employed by enterprises that do not meet the enterprise coverage requirements because there is no reliable way of estimating this population. The estimates also do not exclude workers at non-covered enterprises who are not individually covered (because the estimates assume all workers are employed by covered entities). Although not excluding workers who work for non-covered enterprises would only impact a small percentage of workers generally, it may have a larger impact (and result in a larger overestimate) for workers in non-profits because when determining enterprise coverage only revenue derived from business operations, not charitable activities, are included.

The Department estimated a range of impacts for small entities. To estimate the number of small establishments that will be affected because they employ affected workers the Department assumed that each small establishment employs no more than one affected worker, meaning that at most 1.6 million of the 6.0 million small establishments will employ an affected worker.[300] Thus, these assumptions provide an upper bound estimate of the number of affected small establishments (although it provides a lower bound estimate of the impact per small establishment because costs are spread over a larger number of establishments).[301]

The impacts experienced by an establishment, measured by regulatory costs and payroll increases incurred relative to its financial resources (*e.g.,* payroll or revenues), will increase as the share of its workers that are affected increases.[302] The most severe impacts are most likely to be incurred by establishments in which all employees are affected workers, regardless of establishment size. Therefore, to estimate a lower-end estimate for the number of affected establishments (which generates an upper-end estimate for impacts per establishment) the Department assumes that all workers employed by an affected establishment are affected.

For the purposes of estimating this lower-range number of affected small establishments, the Department used the average size of a small establishment as the typical size of an affected small establishment.[303] The average number of employees in a small establishment is the number of workers employed by small establishments divided by the total number of small establishments in that industry (SUSB 2012). Thus, the number of affected small establishments in an industry, if all employees of an affected establishment are affected, equals the number of affected small establishment employees divided by the average number of employees per small establishment. Since SUSB data provides no information on how affected workers are distributed between these entities, the Department calculated an upper and a lower bound of affected employees per small entity (which, in turn, is associated with an lower and upper bound of the number of affected small entities—and an upper and lower bound of impact per entity; the fewer affected employees, the lower the cost per entity).

Table 38 summarizes the estimated number of affected workers employed by small establishments and the expected range for the number of affected small establishments by industry. The Department estimated that the rule will affect 1.6 million workers who are employed by somewhere between 210,800 and 1.6 million small establishments; this composes from 3.5 percent to 25.9 percent of all small establishments. It also means that from 4.5 million to 5.9 million small establishments incur no more than minimal regulatory familiarization costs (*i.e.,* 6.0 million minus 1.6 million equals 4.5 million; 6.0 million minus 210,000 equals 5.9 million, using rounded values). The table also presents the average number of affected employees per establishment using the method where all employees at the establishment are affected. For the other method, by definition, there is always one affected employee per establishment. Also displayed is the average payroll per small establishment by industry (based on both affected and non-affected small establishments), calculated by dividing total payroll of small businesses (Table 37) by the number of small businesses (Table 37) (applicable to both methods).

TABLE 39—NUMBER OF SMALL AFFECTED ESTABLISHMENTS AND EMPLOYEES BY INDUSTRY AND EMPLOYER TYPE

Industry	Affected workers (1,000s)	Number of establishments (1,000s) [a]		Per establishment	
		One affected employee per estab. [b]	All employees at estab. affected [c]	Affected employees [a]	Average annual payroll ($1,000s)
Total	1,567.5	1,567.5	210.8	7.4	376.1
Industry					
Agriculture	d	d	d	d	d
Forest., log., fish., hunt., and trap	d	d	d	d	d
Mining	11.8	11.8	0.7	18.0	1,268.4
Construction	83.1	83.1	11.2	7.4	361.5

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[300] This assumes 1.6 million of the 4.2 million affected workers are employed in small businesses (see Table 3).

[301] Note that if we underestimated the number of affected workers employed by small businesses, then we underestimated the upper bound of the number of affected small businesses.

[302] Larger establishments are likely to have larger costs than smaller firms since impacts (measured by the absolute dollar value of costs and transfers) will increase as establishment size increases; an establishment employing 50 affected workers will pay greater costs and transfers than one employing 10 affected workers. However, when measured as a percent of payroll and revenues, an establishment with 10 affected employees out of 20 total employees should experience fairly similar impacts as those experienced by an establishment employing 50 affected workers out of 100 employees.

[303] This is not the true lower bound estimate of the number of affected establishments. Strictly speaking, a true lower bound estimate of the number of affected small establishments would be calculated by assuming all employees in the largest small establishments are affected. For example, if the SBA standard is that establishments with 500 employees are "small," and 1,350 affected workers are employed by small establishments in that industry, then the smallest number of establishments that could be affected in that industry (the true lower bound) would be three. However, because such an outcome appears implausible, the Department determined a more reasonable lower estimate would be based on average establishment size.

TABLE 39—NUMBER OF SMALL AFFECTED ESTABLISHMENTS AND EMPLOYEES BY INDUSTRY AND EMPLOYER TYPE—Continued

Industry	Affected workers (1,000s)	Number of establishments (1,000s)[a]		Per establishment	
		One affected employee per estab.[b]	All employees at estab. affected[c]	Affected employees[a]	Average annual payroll ($1,000s)
Nonmetallic mineral prod. manuf	3.9	3.9	0.2	16.4	808.4
Prim. metals and fab. metal prod	18.1	18.1	1.0	17.7	863.7
Machinery manufacturing	17.4	17.4	0.5	32.4	1,771.8
Computer and elect. prod. manuf	22.1	22.1	0.4	50.8	3,800.1
Electrical equip., appliance manuf	[d]	[d]	[d]	[d]	[d]
Transportation equip. manuf	14.0	14.0	0.2	58.9	3,337.6
Wood products	4.8	4.8	0.2	20.7	841.2
Furniture and fixtures manuf	5.6	5.6	0.3	17.3	669.8
Misc. and not spec. manuf	26.9	26.9	1.0	28.1	1,454.3
Food manufacturing	13.1	13.1	0.4	33.9	1,245.8
Beverage and tobacco products	2.8	2.8	0.1	30.5	1,570.2
Textile, app., and leather manuf	10.4	10.4	0.4	23.2	896.8
Paper and printing	14.3	14.3	0.9	16.5	758.7
Petroleum and coal prod. manuf	[d]	[d]	[d]	[d]	[d]
Chemical manufacturing	12.7	12.7	0.3	51.0	3,244.6
Plastics and rubber products	6.5	6.5	0.3	22.2	1,000.2
Wholesale trade	62.1	62.1	13.2	4.7	246.5
Retail trade	147.0	147.0	19.3	7.6	278.8
Transport. and warehousing	23.3	23.3	2.7	8.7	384.2
Utilities	6.9	6.9	0.2	34.1	2,075.4
Publishing ind. (ex. internet)	14.7	14.7	1.3	11.6	671.5
Motion picture and sound recording	9.1	9.1	1.7	5.5	299.1
Broadcasting (except internet)	8.2	8.2	0.3	24.2	1,363.6
Internet publishing and broadcasting	[d]	[d]	[d]	[d]	[d]
Telecommunications	7.7	7.7	0.4	17.1	1,118.1
Internet serv. providers and data	[d]	[d]	[d]	[d]	[d]
Other information services	4.0	4.0	0.2	24.3	979.4
Finance	46.3	46.3	7.7	6.0	406.3
Insurance	48.3	48.3	9.9	4.9	295.1
Real estate	44.9	44.9	9.8	4.6	220.7
Rental and leasing services	5.1	5.1	1.3	4.1	162.2
Professional and technical services	256.8	256.8	48.0	5.3	370.2
Management of companies and enterprises	4.9	4.9	2.9	1.7	100.1
Admin. and support services	49.7	49.7	7.1	7.0	236.5
Waste manag. and remed. services	5.9	5.9	0.5	11.8	529.8
Educational services	44.0	44.0	1.2	35.8	1,691.5
Hospitals	13.2	13.2	0.1	214.7	12,069.1
Health care services, except hospitals	148.9	148.9	17.1	8.7	368.0
Social assistance	91.5	91.5	7.8	11.8	373.2
Arts, entertainment, and recreation	66.9	66.9	6.1	10.9	377.9
Accommodation	11.5	11.5	1.1	10.4	348.2
Food services and drinking places	26.1	26.1	5.3	4.9	113.9
Repair and maintenance	27.3	27.3	4.6	5.9	233.5
Personal and laundry services	16.3	16.3	2.6	6.4	184.6
Membership associations & organizations	84.5	84.5	17.2	4.9	219.8
Private households	[d]	[d]	[d]	[d]	[d]
Public administration[e]	16.5	16.5	1.7	9.5	489.0
Employer Type					
Non-profit, private[f]	216.2	216.2	26.4	8.2	$360.20
For profit, private	1,306.80	1,306.80	165.7	7.9	$360.50
Government (state and local)	44.5	44.5	1.3	33.8	$1,646.70

Note: Establishment data are from the Survey of U.S. Businesses 2012; worker and payroll data from CPS MORG using pooled data for FY2013–FY2015 projected to reflect FY2017.

[a] Estimation of both affected small establishment employees and affected small establishments was done at the most detailed industry level available. Therefore, the ratio of affected small establishment employees to total small establishment employees for each industry may not match the ratio of small affected establishments to total small establishments at more aggregated industry level presented in the table, nor will it equal the ratio at the national level because relative industry size, employment, and small business employment differs from industry to industry.

[b] This method may overestimate the number of affected establishments and therefore the ratio of affected workers to affected establishments may be greater than 1-to-1. However, we addressed this issue by also calculating impacts based on the assumption that 100 percent of workers at an establishment are affected.

[c] For example, on average, a small establishment in the construction industry employs 7.42 workers (4.70 million employees divided by 634,330 small establishments). This method assumes if an establishment is affected then all 7.42 workers are affected. Therefore, in the construction industry this method estimates there are 11,200 small affected establishments (83,100 affected small workers divided by 7.42).

[d] Data not displayed because sample size of affected workers in small establishments is less than 10.

[e] Establishment number represents the total number of state and local governments.

[f] As discussed in section VI.B.iii, estimates of workers subject to the FLSA do not exclude workers employed by enterprises that do not meet the enterprise coverage requirements because there is no reliable way of estimating this population. The estimates also do not exclude workers at non-covered enterprises who are not individually covered (because the estimates assume all workers are employed by covered entities). Although not excluding workers who work for non-covered enterprises would only impact a small percentage of workers generally, it may have a larger impact (and result in a larger overestimate) for workers in non-profits because when determining enterprise coverage only revenue derived from business operations, not charitable activities, are included.

v. Projected Impacts to Affected Small Entities

For small entities, the Department projected annual per-entity costs and payroll increases, including: Regulatory familiarization costs, adjustment costs, managerial costs, and payroll increases to employees. The Department estimates a range for the number of small affected establishments and the impacts they incur. However, few establishments are likely to incur the costs, payroll increases, and impacts at the upper end of this range because it seems unlikely that all employees at a small firm are workers affected by this Final Rule. While the upper and lower bounds are likely over- and under-estimates, respectively, of regulatory costs and increased payroll per small establishment, the Department believes that this range of costs and payroll increases provides the most accurate characterization of the impacts of the rule on small employers.[304] Furthermore, the smaller estimate of the number of affected establishments (*i.e.*, where all employees are assumed to be affected) will result in the largest costs and payroll increases per entity as a percent of establishment payroll and revenue, and the Department expects that many, if not most, entities will incur smaller costs, payroll increases, and impacts relative to establishment size.

As a result of this rule, the Department expects total direct employer costs will range from $157.9 million to $206.8 million for affected small establishments (Table 40) in the first year after the promulgation of the Final Rule. An additional $162.3 million to $211.5 million in regulatory familiarization costs will be incurred by small establishments that do not employ affected workers. The three industries with the highest total number of affected workers in small establishments (professional and technical services; healthcare services, except hospitals; and retail trade) account for about 35 percent of the costs. The largest cost per establishment is expected to be incurred in the hospitals industry ($20,629 using the method where all employees are affected), although the costs are not expected to exceed 0.17 percent of payroll. The largest impact as a share of payroll is projected to be incurred in the food services and drinking places industry, where estimated direct costs compose 0.45 percent of average entity payroll.

TABLE 40—YEAR 1 SMALL ESTABLISHMENT DIRECT COSTS, TOTAL AND PER ESTABLISHMENT, BY INDUSTRY AND EMPLOYER TYPE

Industry	Cost to small entities in year 1[a]					
	One affected employee			All employees affected		
	Total (millions)[b]	Cost per affected entity	Percent of annual payroll	Total (millions)[b]	Cost per affected entity	Percent of annual payroll
Total	$206.8	$132	0.04	$157.9	$749	0.20
Industry						
Agriculture	c	c	c	c	c	c
Forest., log., fish., hunt., and trap	c	c	c	c	c	c
Mining	$1.6	$132	0.01	$1.2	$1,765	0.14
Construction	11.0	132	0.04	8.4	748	0.21
Nonmetallic mineral prod. manuf	0.5	132	0.02	0.4	1,613	0.20
Prim. metals and fab. metal prod	2.4	132	0.02	1.8	1,734	0.20
Machinery manufacturing	2.3	132	0.01	1.7	3,145	0.18
Computer and elect. prod. manuf	2.9	132	0.00	2.1	4,905	0.13
Electrical equip., appliance manuf	c	c	c	c	c	c
Transportation equip. manuf	1.8	132	0.00	1.3	5,690	0.17
Wood products	0.6	132	0.02	0.5	2,023	0.24
Furniture and fixtures manuf	0.7	132	0.02	0.5	1,696	0.25
Misc. and not spec. manuf	3.6	132	0.01	2.6	2,734	0.19
Food manufacturing	1.7	132	0.01	1.3	3,287	0.26
Beverage and tobacco products	0.4	132	0.01	0.3	2,963	0.19
Textile, app., and leather manuf	1.4	132	0.01	1.0	2,265	0.25
Paper and printing	1.9	132	0.02	1.4	1,618	0.21
Petroleum and coal prod. manuf	c	c	c	c	c	c
Chemical manufacturing	1.7	132	0.00	1.2	4,923	0.15
Plastics and rubber products	0.9	132	0.01	0.6	2,168	0.22
Wholesale trade	8.2	132	0.05	6.4	487	0.20
Retail trade	19.4	132	0.05	14.8	767	0.28
Transport. and warehousing	3.1	132	0.03	2.3	869	0.23
Utilities	0.9	132	0.01	0.7	3,308	0.16

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[304] As noted previously, these are not the true lower and upper bounds. The values presented are the highest and lowest estimates the Department believes are plausible.

TABLE 40—YEAR 1 SMALL ESTABLISHMENT DIRECT COSTS, TOTAL AND PER ESTABLISHMENT, BY INDUSTRY AND EMPLOYER TYPE—Continued

Industry	Cost to small entities in year 1 [a]					
	One affected employee			All employees affected		
	Total (millions) [b]	Cost per affected entity	Percent of annual payroll	Total (millions) [b]	Cost per affected entity	Percent of annual payroll
Publishing ind. (ex. internet)	1.9	132	0.02	1.5	1,152	0.17
Motion picture and sound recording	1.2	132	0.04	0.9	564	0.19
Broadcasting (except internet)	1.1	132	0.01	0.8	2,352	0.17
Internet publishing and broadcasting	[c]	[c]	[c]	[c]	[c]	[c]
Telecommunications	1.0	132	0.01	0.7	1,673	0.15
Internet serv. providers and data	[c]	[c]	[c]	[c]	[c]	[c]
Other information services	0.5	132	0.01	0.4	2,363	0.24
Finance	6.1	132	0.03	4.7	611	0.15
Insurance	6.4	132	0.04	5.0	503	0.17
Real estate	5.9	132	0.06	4.7	475	0.22
Rental and leasing services	0.7	132	0.08	0.5	428	0.26
Professional and technical services	33.9	132	0.04	26.4	549	0.15
Management of companies and enterprises	0.6	132	0.13	0.6	200	0.20
Admin. and support services	6.6	132	0.06	5.0	711	0.30
Waste manag. and remed. services	0.8	132	0.02	0.6	1,167	0.22
Educational services	5.8	132	0.01	4.3	3,471	0.21
Hospitals	1.8	132	0.00	1.3	20,629	0.17
Health care services, except hospitals	19.7	132	0.04	14.9	872	0.24
Social assistance	12.1	132	0.04	9.1	1,166	0.31
Arts, entertainment, and recreation	8.8	132	0.03	6.6	1,082	0.29
Accommodation	1.5	132	0.04	1.1	1,032	0.30
Food services and drinking places	3.4	132	0.12	2.7	508	0.45
Repair and maintenance	3.6	132	0.06	2.8	607	0.26
Personal and laundry services	2.2	132	0.07	1.7	647	0.35
Membership associations & organizations	11.2	132	0.06	8.7	508	0.23
Private households	[c]	[c]	[c]	[c]	[c]	[c]
Public administration	2.2	132	0.03	1.6	945	0.19
Employer Type						
Non-profit, private [d]	28.70	133	0.04	21.80	824	0.23
For profit, private	177.40	136	0.04	136.10	821	0.23
Government (state and local)	5.20	116	0.01	3.60	2,723	0.17

Note: Pooled data for FY2013–FY2015 projected to reflect FY2017.

[a] Direct costs include regulatory familiarization, adjustment, and managerial costs.

[b] The range of costs per establishment depends on the number of affected establishments. The minimum assumes that each affected establishment has one affected worker (therefore, the number of affected establishments is equal to the number of affected workers). The maximum assumes the share of workers in small entities who are affected is also the share of small entity establishments that are affected.

[c] Data not displayed because sample size of affected workers in small establishments is less than 10.

[d] As discussed in section VI.B.iii, estimates of workers subject to the FLSA do not exclude workers employed by enterprises that do not meet the enterprise coverage requirements because there is no reliable way of estimating this population. The estimates also do not exclude workers at non-covered enterprises who are not individually covered (because the estimates assume all workers are employed by covered entities). Although not excluding workers who work for non-covered enterprises would only impact a small percentage of workers generally, it may have a larger impact (and result in a larger overestimate) for workers in non-profits because when determining enterprise coverage only revenue derived from business operations, not charitable activities, are included.

Average weekly earnings for affected EAP workers in small establishments are expected to increase by about $6.51 per week per affected worker, using the partial employment contract model[305] described in section VI.D.iv.[306] This would lead to $530.4 million in additional annual wage payments to employees in small entities (less than 0.7 percent of aggregate affected establishment payroll; Table 40). The largest payroll increases per establishment are expected in the sectors of hospitals (up to $54,430 per entity); food manufacturing (up to $26,158 per entity); and transportation equipment manufacturing (up to $20,666 per entity). However, average payroll increases per establishment exceed 2 percent of average payroll in only two sectors: food services and drinking places (3.53 percent) and food manufacturing (2.10 percent).

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[305] As explained in section VI.D.iv., the partial employment contract model reflects the Department's determination that an appropriate estimate of the impact on the implicit hourly rate of pay for regular overtime workers after the Final Rule should be determined using the average of Barkume's two estimates of partial employment contract model adjustments: a wage change that is 40 percent of the adjustment toward the amount predicted by the employment contract model, assuming an initial zero overtime pay premium, and a wage change that is 80 percent of the adjustment assuming an initial 28 percent overtime pay premium.

[306] This is an average increase for all affected workers (both EAP and HCE), and reconciles to the weighted average of individual salary changes discussed in the Transfers section.

TABLE 41—YEAR 1 SMALL ESTABLISHMENT PAYROLL INCREASES, TOTAL AND PER ESTABLISHMENT, BY INDUSTRY AND EMPLOYER TYPE

Industry	Increased payroll for small entities in year 1[a]				
	Total (millions)	One affected employee		All employees affected	
		Per establishment	Percent of annual payroll	Per establishment	Percent of annual payroll
Total	$530.4	$338	0.09	$2,516	0.67
Industry					
Agriculture	b	b	b	b	b
Forest., log., fish., hunt., and trap	b	b	b	b	b
Mining	6.0	509	0.04	9,184	0.72
Construction	35.9	433	0.12	3,209	0.89
Nonmetallic mineral prod. manuf	0.8	193	0.02	3,176	0.39
Prim. metals and fab. metal prod	3.0	163	0.02	2,893	0.33
Machinery manufacturing	4.1	238	0.01	7,704	0.43
Computer and elect. prod. manuf	8.6	390	0.01	19,810	0.52
Electrical equip., appliance manuf	b	b	b	b	b
Transportation equip. manuf	4.9	351	0.01	20,666	0.62
Wood products	3.0	639	0.08	13,238	1.57
Furniture and fixtures manuf	0.5	95	0.01	1,638	0.24
Misc. and not spec. manuf	12.8	477	0.03	13,420	0.92
Food manufacturing	10.1	772	0.06	26,158	2.10
Beverage and tobacco products	0.7	238	0.02	7,263	0.46
Textile, app., and leather manuf	2.9	283	0.03	6,565	0.73
Paper and printing	6.9	478	0.06	7,883	1.04
Petroleum and coal prod. manuf	b	b	b	b	b
Chemical manufacturing	2.7	208	0.01	10,599	0.33
Plastics and rubber products	2.2	338	0.03	7,518	0.75
Wholesale trade	22.2	357	0.14	1,677	0.68
Retail trade	67.4	458	0.16	3,492	1.25
Transport. and warehousing	8.9	382	0.10	3,314	0.86
Utilities	0.4	62	0.00	2,103	0.10
Publishing ind. (ex. internet)	3.1	212	0.03	2,466	0.37
Motion picture and sound recording	6.6	724	0.24	3,979	1.33
Broadcasting (except internet)	2.6	312	0.02	7,540	0.55
Internet publishing and broadcasting	b	b	b	b	b
Telecommunications	0.9	112	0.01	1,917	0.17
Internet serv. providers and data	b	b	b	b	b
Other information services	1.1	270	0.03	6,541	0.67
Finance	22.6	488	0.12	2,922	0.72
Insurance	7.0	145	0.05	708	0.24
Real estate	17.1	382	0.17	1,746	0.79
Rental and leasing services	1.0	197	0.12	806	0.50
Professional and technical services	62.7	244	0.07	1,304	0.35
Management of companies and enterprises	1.9	378	0.38	647	0.65
Admin. and support services	15.9	319	0.13	2,246	0.95
Waste manag. and remed. services	1.5	252	0.05	2,970	0.56
Educational services	7.4	168	0.01	6,019	0.36
Hospitals	3.4	253	0.00	54,430	0.45
Health care services, except hospitals	26.3	176	0.05	1,536	0.42
Social assistance	19.2	210	0.06	2,473	0.66
Arts, entertainment, and recreation	35.0	522	0.14	5,697	1.51
Accommodation	5.7	492	0.14	5,115	1.47
Food services and drinking places	21.3	817	0.72	4,019	3.53
Repair and maintenance	21.2	776	0.33	4,612	1.98
Personal and laundry services	6.6	404	0.22	2,571	1.39
Membership associations & organizations	30.2	357	0.16	1,757	0.80
Private households	b	b	b	b	b
Public administration	5.1	310	0.06	2,936	0.60
Employer Type					
Non-profit, private[c]	72.60	336	0.19	2,745	0.76
For profit, private	449.20	344	0.02	2,711	0.75
Government (state and local)	8.60	194	0.16	6,541	0.40

Note: Pooled data for FY2013–FY2015 projected to reflect FY2017.

[a] Aggregate change in total annual payroll experienced by small entities under the updated salary levels after labor market adjustments. This amount represents the total amount of (wage) transfers from employers to employees.

[b] Data not displayed because sample size of affected workers in small establishments is less than 10.

[c] As discussed in section VI.B.iii, estimates of workers subject to the FLSA do not exclude workers employed by enterprises that do not meet the enterprise coverage requirements because there is no reliable way of estimating this population. The estimates also do not exclude workers at non-covered enterprises who are not individually covered (because the estimates assume all workers are employed by covered entities). Although not excluding workers who work for non-covered enterprises would only impact a small percentage of workers generally, it may have a larger impact (and result in a larger overestimate) for workers in non-profits because when determining enterprise coverage only revenue derived from business operations, not charitable activities, are included.

Table 42 presents estimated first year direct costs and payroll increases combined per establishment and those costs and payroll increases as a percent of average establishment payroll. The Department presents only the results for the upper bound scenario where all workers employed by the establishment are affected. Under this scenario, an affected small establishment is expected to incur between $200 and $20,629 in direct costs (Table 40) and between $647 and $54,430 in additional payroll to employees (Table 41) in the first year after the promulgation of the Final Rule. Combined costs and payroll increases per establishment range from $847 in management of companies and enterprises to $75,059 in the hospitals sector (Table 41).[307] Combined costs and payroll increases compose more than 2 percent of average establishment payroll in three sectors: Food services and drinking places (3.97 percent), food manufacturing (2.36 percent), and repair and maintenance (2.24 percent). In all other sectors, they range from 0.3 percent to 1.8 percent of payroll.

However, comparing costs and payroll increases to payrolls overstates the impact to establishments because payroll represents only a fraction of the financial resources available to an establishment. The Department approximated revenue per small affected establishment by calculating the ratio of small business revenues to payroll by industry from the 2012 SUSB data then multiplying that ratio by average small entity payroll.[308] Using this approximation of annual revenues as a benchmark, only one sector has costs and payroll increases amounting to more than one percent of revenues, food services and drinking places (1.08 percent).

TABLE 42—YEAR 1 SMALL ESTABLISHMENT DIRECT COSTS AND PAYROLL INCREASES, TOTAL AND PER ESTABLISHMENT, BY INDUSTRY AND EMPLOYER TYPE, USING ALL EMPLOYEES IN ESTABLISHMENT AFFECTED METHOD

Industry	Costs and payroll increases for small affected establishments, all employees affected			
	Total (millions)	Per estab. [a]	Percent of annual payroll	Percent of estimated revenues [b]
Total	$688.3	$3,265	0.87	0.17
Industry				
Agriculture	c	c	c	c
Forest., log., fish., hunt., and trap	c	c	c	c
Mining	$7.2	$10,950	0.86	0.13
Construction	44.3	3,956	1.09	0.24
Nonmetallic mineral prod. manuf	1.1	4,790	0.59	0.11
Prim. metals and fab. metal prod	4.7	4,627	0.54	0.12
Machinery manufacturing	5.8	10,849	0.61	0.13
Computer and elect. prod. manuf	10.8	24,715	0.65	0.15
Electrical equip., appliance manuf	c	c	c	c
Transportation equip. manuf	6.3	26,356	0.79	0.13
Wood products	3.5	15,261	1.81	0.31
Furniture and fixtures manuf	1.1	3,334	0.50	0.12
Misc. and not spec. manuf	15.5	16,154	1.11	0.28
Food manufacturing	11.4	29,445	2.36	0.22
Beverage and tobacco products	1.0	10,227	0.65	0.08
Textile, app., and leather manuf	4.0	8,829	0.98	0.16
Paper and printing	8.3	9,501	1.25	0.28
Petroleum and coal prod. manuf	c	c	c	c
Chemical manufacturing	3.9	15,522	0.48	0.04
Plastics and rubber products	2.8	9,685	0.97	0.15
Wholesale trade	28.6	2,163	0.88	0.06
Retail trade	82.2	4,260	1.53	0.15
Transport. and warehousing	11.2	4,183	1.09	0.25
Utilities	1.1	5,411	0.26	0.02
Publishing ind. (ex. internet)	4.6	3,618	0.54	0.19
Motion picture and sound recording	7.5	4,543	1.52	0.40
Broadcasting (except internet)	3.4	9,892	0.73	0.26
Internet publishing and broadcasting	c	c	c	c
Telecommunications	1.6	3,591	0.32	0.05
Internet serv. providers and data	c	c	c	c
Other information services	1.5	8,905	0.91	0.36
Finance	27.3	3,533	0.87	0.31
Insurance	12.0	1,211	0.41	0.09
Real estate	21.8	2,220	1.01	0.22
Rental and leasing services	1.6	1,234	0.76	0.19
Professional and technical services	89.0	1,853	0.50	0.20
Management of companies and enterprises	2.4	847	0.85	0.17
Admin. and support services	20.9	2,957	1.25	0.56

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[307] When a single affected worker is employed, combined costs and transfers by industry are projected to range from $194 (in utilities) to $949 (in food services and drinking places) per establishment.

[308] The ratio of revenues to payroll for small businesses ranged from 2.14 (social assistance) to 43.69 (petroleum and coal products manufacturing), with an average over all sectors of 5.15. The Department used this estimate of revenue, instead of small business revenue reported directly from the 2012 SUSB so revenue aligned with projected payrolls in FY2017.

TABLE 42—YEAR 1 SMALL ESTABLISHMENT DIRECT COSTS AND PAYROLL INCREASES, TOTAL AND PER ESTABLISHMENT, BY INDUSTRY AND EMPLOYER TYPE, USING ALL EMPLOYEES IN ESTABLISHMENT AFFECTED METHOD—Continued

Industry	Costs and payroll increases for small affected establishments, all employees affected			
	Total (millions)	Per estab.[a]	Percent of annual payroll	Percent of estimated revenues[b]
Waste manag. and remed. services	2.1	4,137	0.78	0.20
Educational services	11.6	9,489	0.56	0.22
Hospitals	4.6	75,059	0.62	0.27
Health care services, except hospitals	41.2	2,408	0.65	0.28
Social assistance	28.3	3,639	0.98	0.45
Arts, entertainment, and recreation	41.6	6,779	1.79	0.59
Accommodation	6.8	6,148	1.77	0.44
Food services and drinking places	24.0	4,527	3.97	1.08
Repair and maintenance	23.9	5,219	2.24	0.63
Personal and laundry services	8.2	3,218	1.74	0.60
Membership associations & organizations	38.9	2,266	1.03	0.26
Private households	[c]	[c]	[c]	[c]
Public administration	6.8	3,881	0.79	0.22
Employer Type				
Non-profit, private[d]	94.40	3,570	1.00	0.30
For profit, private	585.30	3,532	1.00	0.20
Government (state and local)	12.20	9,264	0.60	0.20

Note: Pooled data for FY2013–FY2015 projected to reflect FY2017.

[a] Total direct costs and transfers for small establishments in which all employees are affected. Impacts to small establishments in which one employee is affected will be a fraction of the impacts presented in this table.

[b] Revenues estimated by calculating the ratio of estimated small business revenues to payroll from the 2012 SUSB, and multiplying by payroll per small entity. For the public administration sector, the ratio was calculated using revenues and payroll from the 2012 Census of Governments.

[c] Data not displayed because sample size of affected workers in small establishments is less than 10.

[d] As discussed in section VI.B.iii, estimates of workers subject to the FLSA do not exclude workers employed by enterprises that do not meet the enterprise coverage requirements because there is no reliable way of estimating this population. The estimates also do not exclude workers at non-covered enterprises who are not individually covered (because the estimates assume all workers are employed by covered entities). Although not excluding workers who work for non-covered enterprises would only impact a small percentage of workers generally, it may have a larger impact (and result in a larger overestimate) for workers in non-profits because when determining enterprise coverage only revenue derived from business operations, not charitable activities, are included.

The Department also considered costs and payroll increases relative to profits (Table 43). The denominator is all profits in an industry, rather than profits per affected establishment. In Table 42 we compared costs and payroll increases to payroll and revenue per establishment; therefore, the numbers in Table 42 and Table 43 are not directly comparable. The broader denominator was used for the profit analysis to be consistent with the profit analysis conducted for the 2004 Final Rule. Due to the broader denominator, total costs and payroll increases in this table include regulatory familiarization costs to non-affected small establishments. Additionally, this table differs from Table 42 because it is conducted at the more aggregated 13 major industry level. This is due to data limitations in the profit data.[309] [310]

Benchmarking against profit is potentially helpful in the sense that it provides a measure of the Final Rule's effect against returns to investment and possible adjustments arising from changes in that outcome. However, this metric must be interpreted carefully as it does not account for differences across industries in terms of risk-adjusted rates of return, nor does it reflect differences in the firm-level adjustment to profit impacts reflecting cross-industry variation in market structure. Costs and payroll increases as a percent of profits are highest in leisure and hospitality industry (although the information industry may be more affected because profits are negative). However, the magnitude of the relative shares is small, representing less than 0.8 percent of profits in each industry and 0.14 percent in aggregate. Similarly, costs and payroll increases as a percent of either payroll or revenue are highest in the leisure and hospitality industry.

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[309] Internal Revenue Service. (2012). Corporation Income Tax Returns. Available at: *https://www.irs.gov/pub/irs-soi/12coccr.pdf*.

[310] Table 5 of the IRS report provides information on total receipts and net income (less deficits) by size of business receipts, but is only available at a 2-digit NAICS level. The Department used the small business share of total revenues by industry from the 2012 SUSB data to approximate the appropriate business receipt sizes to include in the calculation of the profit ratio from the IRS data. The Department calculated the profit ratio as net income (less deficits) to receipts for small businesses in each industry. This ratio was then applied to revenue data to estimate profits.

TABLE 43—YEAR 1 SMALL ESTABLISHMENT DIRECT COSTS AND PAYROLL INCREASES, BY INDUSTRY

Industry	Costs and payroll increases for all small establishments			
	Total (millions) [a]	Percent of annual payroll	Percent of estimated revenues [b]	Percent of profits [c]
Total	899.9	0.04	0.01	0.14
Industry				
Agriculture, forestry, fishing, & hunting	$1.4	0.01	0.00	0.02
Mining	8.0	0.03	0.00	0.17
Construction	66.9	0.03	0.01	0.19
Manufacturing	89.7	0.02	0.00	0.09
Wholesale & retail trade	146.5	0.05	0.00	0.20
Transportation & utilities	18.7	0.02	0.00	0.16
Information	22.6	0.05	0.01	[d]
Financial activities	80.8	0.05	0.01	0.06
Professional & business services	153.6	0.04	0.02	0.25
Education & health services	112.5	0.03	0.01	0.11
Leisure & hospitality	95.1	0.08	0.02	0.75
Other services	94.8	0.07	0.02	0.48
Public administration	9.4	0.03	0.01	[e]

Note: Pooled data for FY2013–FY2015 projected to reflect FY2017.

[a] Total costs and payroll increases include regulatory familiarization costs to non-affected small establishments.

[b] Revenues estimated by calculating the ratio of estimated small business revenues to payroll from the 2012 SUSB, and multiplying by payroll per small entity. For the public administration sector, the ratio was calculated using revenues and payroll from the 2012 Census of Governments.

[c] Profit data based on corporations only. IRS data disaggregates net income data by business receipt size. Because the SBA standards for small businesses in some industries are based on number of employees, the Department had to estimate which receipt size categories to consider as small businesses.

[d] Profits in this industry were negative in the 2012 Corporation Income Tax Returns, Statistics of Income, IRS.

[e] Profit is not applicable for public administration.

vi. Projected Impacts to Affected Small Entities in Year 2 Through Year 10

To determine how small businesses will be affected in future years, the Department projected costs to small business for nine years after Year 1 of the rule. Projected employment and earnings were calculated using the same methodology described in Section VI.B.ii. Affected employees in small firms follow a similar pattern to affected workers in all establishments. The number decreases gradually in years without automatic updates, but the increases in years with automatic updates offset this fall and result in a net growth over time. There are 1.6 million affected workers in small establishments in Year 1 and 2.0 million in Year 10. Table 44 reports affected workers only in years when the salary level increases.

TABLE 44—PROJECTED NUMBER OF AFFECTED WORKERS IN SMALL ESTABLISHMENTS, BY INDUSTRY

Industry	Affected workers in small establishments (1,000s)			
	Year 1	Year 4	Year 7	Year 10
Total	1,567.5	1,711.1	1,838.2	1,955.3
Agriculture	[a]	[a]	[a]	2.4
Forest., log., fish., hunt., and trap	[a]	[a]	[a]	[a]
Mining	11.8	14.0	14.8	16.2
Construction	83.1	90.2	98.3	106.1
Nonmetallic mineral prod. manuf	3.9	4.8	4.7	5.5
Prim. metals and fab. metal prod	18.1	18.9	18.6	19.4
Machinery manufacturing	17.4	17.7	17.8	17.1
Computer and elect. prod. manuf	22.1	21.7	22.2	22.3
Electrical equip., appliance manuf	[a]	[a]	[a]	[a]
Transportation equip. manuf	14.0	14.2	14.1	13.7
Wood products	4.8	4.8	4.7	4.8
Furniture and fixtures manuf	5.6	5.4	5.4	5.2
Misc. and not spec. manuf	26.9	27.7	28.8	28.5
Food manufacturing	13.1	16.0	17.6	17.5
Beverage and tobacco products	2.8	2.8	3.5	3.4
Textile, app., and leather manuf	10.4	11.6	11.6	11.8
Paper and printing	14.3	15.5	16.6	17.1
Petroleum and coal prod. manuf	[a]	[a]	[a]	[a]
Chemical manufacturing	12.7	13.8	14.9	16.7
Plastics and rubber products	6.5	6.6	6.1	6.0
Wholesale trade	62.1	69.5	72.5	77.0
Retail trade	147.0	161.3	174.9	186.5
Transport. and warehousing	23.3	24.9	28.9	32.2

TABLE 44—PROJECTED NUMBER OF AFFECTED WORKERS IN SMALL ESTABLISHMENTS, BY INDUSTRY—Continued

Industry	Affected workers in small establishments (1,000s)			
	Year 1	Year 4	Year 7	Year 10
Utilities	6.9	6.7	7.4	7.3
Publishing ind. (ex. internet)	14.7	15.2	17.4	17.7
Motion picture and sound recording	9.1	9.5	10.4	10.5
Broadcasting (except internet)	8.2	8.8	10.1	11.0
Internet publishing and broadcasting	[a]	[a]	[a]	[a]
Telecommunications	7.7	8.1	8.7	8.8
Internet serv. providers and data	[a]	[a]	3.1	3.2
Other information services	4.0	4.0	4.4	4.4
Finance	46.3	49.2	51.5	53.9
Insurance	48.3	50.9	56.4	59.5
Real estate	44.9	50.1	56.2	61.4
Rental and leasing services	5.1	5.6	5.7	5.8
Professional and technical services	256.8	278.6	296.8	314.0
Management of companies and enterprises	4.9	5.4	6.9	7.5
Admin. and support services	49.7	56.0	60.5	65.1
Waste manag. and remed. services	5.9	7.6	9.5	10.1
Educational services	44.0	46.9	51.2	56.0
Hospitals	13.2	15.4	15.8	17.2
Health care services, except hospitals	148.9	165.9	182.4	199.0
Social assistance	91.5	105.8	115.4	123.3
Arts, entertainment, and recreation	66.9	71.4	75.6	82.8
Accommodation	11.5	12.5	12.9	14.6
Food services and drinking places	26.1	29.1	31.5	33.1
Repair and maintenance	27.3	29.9	31.1	33.4
Personal and laundry services	16.3	17.4	19.4	20.2
Membership associations and organizations	84.5	93.2	96.6	101.8
Private households	[a]	[a]	[a]	[a]
Public administration	16.5	17.8	18.4	19.4

Note: Worker data are from CPS MORG using pooled data for FY2013–FY2015 projected to reflect FY2017 in Year 1.

[a] Data not displayed because sample size of affected workers in small establishments is less than 10.

Costs to small establishments decrease in the years following Year 1 because regulatory familiarization costs are zero in years without automatic updates, and adjustment costs are significantly smaller in years without automatic updating. However, both direct costs and payroll increase over time as more workers become affected, leading to higher managerial costs and earnings for affected workers. Therefore, by Year 10 additional costs and payroll to small businesses have increased from $688.3 in Year 1 to $901.8 in Year 10 (Table 45). Despite this increase over the 10-year period, even in Year 10 costs and payroll increases are a relatively negligible 0.04 percent and 0.01 percent share of payroll and revenue respectively, assuming no growth in real firm payroll or revenues. The Department notes that due to relatively small sample sizes the estimates by detailed industry are not precise. This can cause some numbers in the data to vary across years by a greater amount than they will in the future.

TABLE 45—PROJECTED SMALL ESTABLISHMENT DIRECT COSTS AND PAYROLL INCREASES, BY INDUSTRY, USING ALL EMPLOYEES IN ESTABLISHMENT AFFECTED METHOD

Industry	Costs and payroll increases for all small affected establishments, all employees affected (millions)			
	Year 1	Year 4	Year 7	Year 10
Total	688.3	629.3	749.3	901.8
Agriculture	[a]	[a]	[a]	3.9
Forest., log., fish., hunt., and trap	[a]	[a]	[a]	[a]
Mining	7.2	12.8	15.0	17.6
Construction	44.3	34.5	44.3	51.9
Nonmetallic mineral prod. manuf	1.1	1.5	1.7	2.8
Prim. metals and fab. metal prod	4.7	4.3	4.3	5.1
Machinery manufacturing	5.8	4.3	4.4	4.4
Computer and elect. prod. manuf	10.8	14.8	18.0	21.1
Electrical equip., appliance manuf	[a]	[a]	[a]	[a]
Transportation equip. manuf	6.3	6.3	6.2	6.1
Wood products	3.5	5.7	5.9	6.4
Furniture and fixtures manuf	1.1	0.7	0.7	0.7
Misc. and not spec. manuf	15.5	13.0	15.1	16.1
Food manufacturing	11.4	10.2	12.1	13.5
Beverage and tobacco products	1.0	0.6	1.6	1.6

TABLE 45—PROJECTED SMALL ESTABLISHMENT DIRECT COSTS AND PAYROLL INCREASES, BY INDUSTRY, USING ALL EMPLOYEES IN ESTABLISHMENT AFFECTED METHOD—Continued

Industry	Costs and payroll increases for all small affected establishments, all employees affected (millions)			
	Year 1	Year 4	Year 7	Year 10
Textile, app., and leather manuf	4.0	3.3	4.8	5.0
Paper and printing	8.3	7.4	9.1	14.7
Petroleum and coal prod. manuf	[a]	[a]	[a]	[a]
Chemical manufacturing	3.9	3.8	3.9	5.3
Plastics and rubber products	2.8	2.5	3.0	3.3
Wholesale trade	28.6	28.1	34.1	43.8
Retail trade	82.2	76.7	99.1	125.1
Transport. and warehousing	11.2	8.7	10.5	14.5
Utilities	1.1	0.7	0.7	0.9
Publishing ind. (ex. internet)	4.6	5.4	5.8	6.4
Motion picture and sound recording	7.5	6.9	7.4	7.8
Broadcasting (except internet)	3.4	3.4	4.0	4.3
Internet publishing and broadcasting	[a]	[a]	[a]	[a]
Telecommunications	1.6	1.1	1.2	1.4
Internet serv. providers and data	[a]	[a]	0.9	1.0
Other information services	1.5	1.0	1.9	1.1
Finance	27.3	28.5	31.8	34.9
Insurance	12.0	9.4	10.6	11.4
Real estate	21.8	16.0	20.0	21.9
Rental and leasing services	1.6	1.9	1.9	1.9
Professional and technical services	89.0	81.7	92.2	114.0
Management of companies and enterprises	2.4	1.9	2.0	2.2
Admin. and support services	20.9	20.1	27.8	35.3
Waste manag. and remed. services	2.1	5.9	5.8	9.1
Educational services	11.6	9.1	10.6	13.1
Hospitals	4.6	4.3	5.2	5.8
Health care services, except hospitals	41.2	34.0	38.9	46.8
Social assistance	28.3	22.6	24.9	28.3
Arts, entertainment, and recreation	41.6	36.9	41.5	47.6
Accommodation	6.8	8.3	11.8	17.4
Food services and drinking places	24.0	21.4	27.6	33.0
Repair and maintenance	23.9	21.3	24.3	28.6
Personal and laundry services	8.2	7.1	8.3	8.8
Membership associations and organizations	38.9	33.3	39.9	46.7
Private households	[a]	[a]	[a]	[a]
Public administration	6.8	6.1	6.4	8.6

Note: Pooled data for FY2013–FY2015 projected to reflect FY2017 in Year 1.

[a] Data not displayed because sample size of affected workers in small establishments is less than 10.

The Department projected costs and payroll increases per affected small establishment using the range for the estimated number of affected small establishments. Table 46 shows projected costs and payroll increases in Years 1, 4, 7, and 10 for the ten industries with the highest costs and payroll increases in Year 1. Affected small establishments in the hospitals industry have the largest costs and payroll increases per establishment using the scenario where all workers employed by the establishment are affected. Using the scenario where one worker per establishment is affected, the costs and payroll increases per establishment are highest in Year 1 in the food services and drinking places industry.

TABLE 46—PROJECTED DIRECT COSTS AND PAYROLL INCREASES PER SMALL ESTABLISHMENT

Industry	Costs and payroll increases per affected small establishments for ten industries with highest costs[a]			
	Year 1	Year 4	Year 7	Year 10
All Employees Affected at Small Establishment Affected				
Hospitals	$75,059	$69,034	$85,024	$93,262
Food manufacturing	29,445	26,410	31,303	34,962
Transportation equip. manuf	26,356	26,656	26,229	25,653
Computer and elect. prod. manuf	24,715	33,947	41,226	48,334
Misc. and not spec. manuf	16,154	13,550	15,740	16,794
Chemical manufacturing	15,522	15,271	15,543	21,268
Wood products	15,261	24,826	25,695	27,934
Mining	10,950	19,532	22,967	26,945
Machinery manufacturing	10,849	7,921	8,162	8,231

TABLE 46—PROJECTED DIRECT COSTS AND PAYROLL INCREASES PER SMALL ESTABLISHMENT—Continued

Industry	Costs and payroll increases per affected small establishments for ten industries with highest costs [a]			
	Year 1	Year 4	Year 7	Year 10
Beverage and tobacco products	10,227	6,770	17,102	17,514
One Employee Affected at Each Small Establishment Affected				
Food services and drinking places	949	822	1,059	1,267
Repair and maintenance	908	783	894	1,051
Food manufacturing	904	782	927	1,035
Motion picture and sound recording	856	758	814	858
Wood products	771	1,201	1,243	1,351
Arts, entertainment, and recreation	654	553	623	714
Mining	642	1,086	1,277	1,497
Accommodation	625	721	1,028	1,517
Finance	620	619	690	757
Paper and printing	610	519	638	1,025

Note: Pooled data for FY2013–FY2015 projected to reflect FY2017 in Year 1.
[a] Assuming no growth in number of establishments. Highest cost is based on cost in Year 1.

E. Description of the Compliance Requirements for Small Entities

The FLSA sets minimum wage, overtime pay, and recordkeeping requirements for employment subject to its provisions. Unless exempt, covered employees must be paid at least the minimum wage for all hours worked and not less than one and one-half times their regular rates of pay for overtime hours worked. Every employer with covered employees must keep certain records for each nonexempt worker. The regulations at part 516 require employers to maintain records for employees subject to the minimum wage and overtime pay provisions of the FLSA. Thus, the recordkeeping requirements are not new requirements; however, employers would need to keep some additional records for additional affected employees (*i.e.,* newly nonexempt workers). As indicated in this analysis, the Final Rule would expand minimum wage and overtime pay coverage to approximately 4.1 million affected EAP workers (excluding Type 4 workers who remain exempt) (section VI.D.vii.). This would result in an increase in employer burden and was estimated in the PRA portion (section V) of this Final Rule. Note that the burdens reported for the PRA section of this Final Rule include the entire information collection and not merely the additional burden estimated as a result of this Final Rule.

F. Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities

This section discusses the description of the steps the agency has taken to minimize the significant economic impact on small entities, consistent with the stated objectives of the FLSA. It includes a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the Final Rule and why other alternatives were rejected.

After considering the comments, the Department has made several changes from the proposed rule to the Final Rule. In particular, the Department has modified the standard salary level to more fully account for the salaries paid in low wage regions. In this Final Rule, the Department sets the standard salary level equal to the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region (currently the South). This results in a salary level of $913 per week, or $47,476 annually for a full-year worker, based on data from the fourth quarter of 2015.[311] The Department believes that a standard salary level set at the 40th percentile of full-time salaried employees in the lowest-wage Census Region will accomplish the goal of setting a salary threshold that adequately distinguishes between employees who may meet the duties requirements of the EAP exemption and those who likely do not, without necessitating the reintroduction of a limit on nonexempt work, as existed under the long duties test. The Department sets the HCE total annual compensation level equal to the 90th percentile of earnings of full-time salaried workers nationally ($134,004 annually based on the fourth quarter of 2015), as we proposed. This increase will bring the annual compensation requirement in line with the level established in 2004. The Department believes that this will avoid the unintended exemption of large numbers of employees in high-wage areas—such as secretaries in New York City or Los Angeles—who are clearly not performing EAP duties.

In order to prevent the salary and compensation levels from becoming outdated, the Department is including in the regulations a mechanism to automatically update the salary and compensation thresholds by maintaining the fixed percentiles of weekly earnings set in this Final Rule. In response to comments, however, the Final Rule provides for updates every three years rather than for annual updates as proposed. The first update will take effect on January 1, 2020. The Department believes that regularly updating the salary and compensation levels is the best method to ensure that these tests continue to provide an effective means of distinguishing between overtime-eligible white collar employees and those who may be bona fide EAP employees. Based on historical wage growth in the South, at the time of the first update on January 1, 2020, the standard salary level is likely to be approximately $984 per week ($51,168 annually for a full-year worker) and the HCE total annual compensation requirement is likely to be approximately $147,524.

The Department also revises the regulations to permit employers for the first time to count nondiscretionary bonuses, incentives, and commissions toward up to 10 percent of the required salary level for the standard exemption, so long as employers pay those amounts on a quarterly or more frequent basis.

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[311] The Bureau of Labor Statistics (BLS) estimated this value using Current Population Survey (CPS) data for earnings of full-time (defined as at least 35 hours per week) non-hourly paid employees. For the purpose of this rulemaking, the Department considers data representing compensation paid to non-hourly workers to be an appropriate proxy for compensation paid to salaried workers.

In setting the effective date of the rule, the Department responded to concerns raised about the amount of time required to evaluate and adjust to the new salary level. While the 2004 rule provided for 120 days, the final rule provides 180 days prior to the effective date.

Finally, the Department sought comments on modifications to the duties test in the proposed rule as a means to modernize overtime protections. In reviewing those comments including numerous responses from small entities, the Department decided to not make any changes to the duties tests in this Final Rule.

i. Differing Compliance and Reporting Requirements for Small Entities

This Final Rule provides no differing compliance requirements and reporting requirements for small entities. The Final Rule imposes no new reporting or recordkeeping requirements, although employers will be required to record and maintain records, as required by part 516, for additional workers if employees are reclassified from exempt to overtime-protected status. The Department has strived to minimize respondent recordkeeping burden by requiring no specific form or order of records under the FLSA and its corresponding regulations. Moreover, employers would normally maintain the records under usual or customary business practices.

ii. Least Burdensome Option or Explanation Required

The Department believes it has chosen the most effective option that updates and clarifies the rule and which results in the least burden. Among the options considered by the Department, the least restrictive option was inflating the 2004 standard salary level to FY2015 dollars using CPI–U (which would result in a standard salary level of $570 per week) and the most restrictive was updating the 1975 short test salary level for inflation based upon the CPI–U (which would result in a standard salary level of $1,100 per week). A lower salary level—or a degraded stagnant level over time—would result in a less effective bright-line test for separating potentially exempt workers from those nonexempt workers intended to be within the Act's protection. A low salary level will also increase the role of the duties test in determining whether an employee is exempt, which would increase the likelihood of misclassification and, in turn, increase the risk that employees who should receive overtime and minimum wage protections under the FLSA are denied those protections. The Department found the most restrictive option to be overly burdensome on business in general, and specifically on small businesses. It was also inappropriately high given the fact that the long duties test (which was associated with a lower salary level) no longer exists.

Pursuant to section 603(c) of the RFA, the following alternatives are to be addressed:

- Differing compliance or reporting requirements that take into account the resources available to small entities. The FLSA creates a level playing field for businesses by setting a floor below which employers may not pay their employees. To establish differing compliance or reporting requirements for small businesses would undermine this important purpose of the FLSA, and appears to be unnecessary given the small annualized cost of the rule. The Year 1 cost of the Final Rule was estimated to be around $3,265 for a typical employer that qualifies as small, which is 0.87 percent of average annual payroll and 0.17 percent of average annual revenues. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance. Therefore the Final Rule does not provide differing compliance or reporting requirements for small businesses.

- The use of performance rather than design standards. Under the Final Rule, the employer may achieve compliance through a variety of means. The employer may elect to continue to claim the EAP exemption for affected employees by adjusting their salary level, hire additional workers or spread overtime hours to other employees, or compensate employees for overtime hours worked. The Department makes available to employers a variety of resources for understanding their obligations and achieving compliance.

- An exemption from coverage of the rule, or any part thereof, for such small entities. Creating an exemption from coverage of this rule for businesses with as many as 1,500 employees (those defined as small businesses under SBA's size standards) is inconsistent with Congressional intent in the enactment of the FLSA, which applies to all employers that satisfy the enterprise coverage threshold or employ individually covered employees. *See* 29 U.S.C. 203(s).

F. Identification, to the Extent Practicable, of all Relevant Federal Rules That May Duplicate, Overlap, or Conflict With the Final Rule

The Department is not aware of any federal rules that duplicate, overlap, or conflict with this Final Rule.

VIII. Unfunded Mandates Reform Act Analysis

The Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1501, requires agencies to prepare a written statement for rules for which a general notice of proposed rulemaking was published and that include any federal mandate that may result in increased expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of $156 million ($100 million in 1995 dollars adjusted for inflation) or more in at least one year. This statement must: (1) Identify the authorizing legislation; (2) present the estimated costs and benefits of the rule and, to the extent that such estimates are feasible and relevant, its estimated effects on the national economy; (3) summarize and evaluate state, local, and tribal government input; and (4) identify reasonable alternatives and select, or explain the non-selection, of the least costly, most cost-effective, or least burdensome alternative.

A. Authorizing Legislation

This Final Rule is issued pursuant to section 13(a)(1) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 213(a)(1). The section exempts from the FLSA's minimum wage and overtime pay requirements "any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of [the Administrative Procedure Act] . . .)." 29 U.S.C. 213(a)(1). The requirements of the exemption provided by this section of the Act are contained in part 541 of the Department's regulations. Section 3(e) of the FLSA, 29 U.S.C. 203(e), defines "employee" to include most individuals employed by a state, political subdivision of a state, or interstate governmental agency. Section 3(x) of the FLSA, 29 U.S.C. 203(x), also defines public agencies to include the government of a state or political subdivision thereof, or any interstate governmental agency.

B. Assessment of Costs and Benefits

For purposes of UMRA, this rule includes a federal mandate that is expected to result in increased expenditures by the private sector of more than $156 million in at least one year, but the rule will not result in increased expenditures by state, local and tribal governments, in the aggregate, of $156 million or more in any one year.

Costs to state and local governments: Based on the economic impact analysis of this Final Rule, the Department determined that the Final Rule will result in Year 1 costs for state and local governments totaling $115.1 million, of which $38.8 million are direct employer costs and $76.3 million are payroll increases (5). Additionally, the Final Rule will lead to $0.3 million in dead weight loss (DWL). In subsequent years, the Department estimated that state and local governments may experience payroll increases of as much as $85.4 million in a year when the salary level is automatically updated.

Costs to the private sector: The Department determined that the Final Rule will result in Year 1 costs to the private sector of approximately $1.8 billion, of which $637.7 million are direct employer costs and $1.2 billion are payroll increases. Additionally, the Final Rule will result in $6.0 million in DWL. In subsequent years, the Department estimated that the private sector may experience a payroll increase of as much as $1.5 billion per year.

TABLE 47—SUMMARY OF YEAR 1 AFFECTED EAP WORKERS, REGULATORY COSTS, AND TRANSFERS BY TYPE OF EMPLOYER

	Total	Private	Government[a]
Affected EAP Workers (1,000s)			
Number	4,228	3,765	452
Direct Employer Costs (Millions)			
Regulatory familiarization	$272.5	$268.9	$3.3
Adjustment	191.4	170.5	20.5
Managerial	214.0	198.3	15.1
Total direct costs	677.9	637.7	38.8
Payroll Increases (Millions)			
From employers to workers	$1,285.2	$1,206.4	$76.3
Direct Employer Costs & Transfers (Millions)			
From employers	$1,963.1	$1,844.1	$115.1
DWL (Millions)			
DWL[b]	$6.4	$6.0	$0.3

[a] Includes only state, local, and tribal governments.

[b] DWL was estimated based on the aggregate impact of both the minimum wage and overtime pay provisions.

The largest estimated impact to workers is likely the transfer of income to workers from some combination of employers, end consumers, and other workers); but, to the extent that the utility derived by workers outweighs the disutility experienced by employers and other entities experiencing the negative side of transfers, there may be a societal welfare increase due to this transfer. The channels through which societal welfare may change, and other secondary benefits, transfers and costs may occur, include: Decreased litigation costs due to fewer workers subject to the duties test, the multiplier effect of the transfer, changes in productivity, potentially reduced dependence on social assistance, and a potential increase in time off and its associated benefits to the social welfare of some workers (for instance, those who work so many hours that the overtime requirement renders their current combination of pay and hours worked non-compliant with the minimum wage). Additionally, because of the increased salary level, overtime protection will be strengthened for 5.7 million salaried white collar workers and 3.2 million salaried blue collar workers who do not meet the duties requirements for the EAP exemption, but who earn between the current minimum salary level of $455 per week and the updated salary level, because their right to minimum wage and overtime protection will be clear rather than depend upon an analysis of their duties.

UMRA requires agencies to estimate the effect of a regulation on the national economy if, at its discretion, such estimates are reasonably feasible and the effect is relevant and material. 5 U.S.C. 1532(a)(4). However, OMB guidance on this requirement notes that such macroeconomic effects tend to be measurable in nationwide econometric models only if the economic impact of the regulation reaches 0.25 percent to 0.5 percent of GDP, or in the range of $44.9 billion to $89.7 billion (using 2015 GDP). A regulation with smaller aggregate effect is not likely to have a measurable impact in macro-economic terms unless it is highly focused on a particular geographic region or economic sector, which is not the case with this Final Rule.

The Department's RIA estimates that the total first-year costs (direct employer costs, payroll increases from employers to workers, and deadweight loss) of the Final Rule will be approximately $1.8 billion for private employers and $115.1 million for state and local governments. Given OMB's guidance, the Department has determined that a full macroeconomic analysis is not likely to show any measurable impact on the economy. Therefore, these costs are compared to payroll costs and revenue to demonstrate the feasibility of adapting to these new rules.

Total first-year private sector costs compose 0.03 percent of private sector payrolls nationwide.[312] Total private sector first-year costs compose 0.005 percent of national private sector revenues (revenues in FY2015 are projected to be $40.7 trillion).[313] The Department concludes that impacts of this magnitude are affordable and will not result in significant disruptions to typical firms in any of the major industry categories.

Total first-year state and local government costs compose approximately 0.01 percent of state and local government payrolls.[314] First-year state and local government costs compose 0.004 percent of state and local government revenues (projected FY2015 revenues were estimated to be $3.1 trillion).[315] Impacts of this magnitude will not result in significant disruptions to typical state and local governments. The $115.1 million in state and local government costs constitutes an average of approximately $1,277 for each of the approximately 90,106 state and local entities. The Department considers impacts of this magnitude to be quite small both in absolute terms and in relation to payrolls and revenue.

C. Response to Comments

i. Consultation Prior to the Issuance of the NPRM

Prior to issuing the NPRM, the Department embarked on an extensive outreach program, conducting listening sessions in Washington, DC, and several other locations, as well as by conference call. As part of this outreach program, the Department conducted stakeholder listening sessions with representatives of state, local, and tribal governments. In these sessions the Department asked stakeholders to address, among other issues, three questions: (1) What is the appropriate salary level for exemption; (2) what, if any, changes should be made to the duties tests; and (3) how can the regulations be simplified. The discussions in the listening sessions informed the development of the NPRM.

ii. Comments Received in Response to the NPRM

In the NPRM, the Department specifically sought comments from state, local, and tribal governments concerning the ability of these entities to absorb the costs related to the proposed revisions. The Department received multiple comments on this and other issues from state, local, and tribal governments. Many of these commenters raised concerns about the Department's proposal to increase the salary level. Several commenters writing on behalf of state or local governments asserted that public employers would respond to the proposed salary level increase by cutting vital services or increasing taxes. *See, e.g.*, Charlotte County, Florida; Pennsylvania State Association of Township Supervisors; Rockingham County, Virginia. Several commenters writing on behalf of tribal governments similarly asserted that tribes would be forced to respond to the proposed salary level increase by reducing services to tribal communities. *See, e.g.*, Ho-Chunk, Inc. (a company wholly owned by the Winnebago Tribe of Nebraska); Native American Finance Officers Association. The Jamestown S'Kallam Tribe stated that "requiring Tribal business to 'transfer income' to employees takes money not only out of tribal governments, but to the economy of the surrounding communities as tribes provide enormous employment opportunities to the non-native communities." Given these concerns, some commenters writing on behalf of state, local, or tribal governments requested that the Department adopt a lower standard salary threshold than we proposed and/or a phase-in period for raising the salary, while other commenters requested a special salary level or an exemption from the salary level or the FLSA's requirements for state, local, and tribal governments. *See, e.g.*, Georgia Department of Administrative Services; Isle of Wight County, Virginia; Mississippi State Personnel Board; Pennsylvania State Association of Township Supervisors; New Mexico State Personnel Board. In addition to their concerns about the salary level, some commenters, for example the New Mexico State Personnel Board and the Mississippi State Personnel Board, also expressed concern about the Department's proposal to update the salary level annually, and some requested that the Department not make any changes to the duties test.

As discussed in this Final Rule, the Department has modified the proposed rule by setting the salary level equal to the 40th percentile weekly earnings of full-time salaried workers in the lowest-wage Census Region (currently the South). We believe that this adjustment will provide relief for state, local, and tribal government employers, as it does for employers in low-wage areas and industries. Furthermore, the Department has decided to automatically update the salary level every three years rather than annually, and the Final Rule does not make any changes to the duties test. The Department notes that we expect employers to respond in a variety of ways to changes in salary level, and the manner in which an employer responds will affect how the employer (and its employees) is impacted. In response to comments suggesting the implementation of a special salary threshold or an exemption for state, local, or tribal government employers, the Department did not propose any different treatment for employees of state, local, or tribal government employers or ask any questions in the NPRM about such a change; therefore, we believe the special provisions sought are beyond the scope of this rulemaking.

Some state, local, and tribal governments expressed concern with our automatic updating proposal. Several commenters stressed the burdens this change would impose on public sector employers. For example, the California State Association of Counties stated that the "volatility of the [salary level] changes" resulting from annual automatic updating would "make planning and budgeting very challenging," while the Charlotte County Board of County Commissioners asked the Department to "strongly consider the increased administrative and financial burdens" that annual updating "would place on county governments." *See also* City of Galax. Similarly, the New Mexico State Personnel Board stated that "in the public sector, an automatic annual increase would become an unbudgeted mandate placed on the Executive and the Legislature, which would require the State to respond both fiscally and administratively," and that this change could negatively impact employee morale and productively, the State's budgeting process, and "may cause budgets to be diverted from other areas such as health, safety, and security, possibly impacting services to citizens."

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[312] Private sector payroll costs nationwide are projected to be $5.7 trillion in FY2015. This projection is based on private sector payroll costs in 2012, which were $5.6 trillion using the 2012 Economic Census of the United States. This was inflated to FY2015 dollars using the CPI–U. Table EC0700A1: All sectors: Geographic Area Series: Economy-Wide Key Statistics: 2007.

[313] Private sector revenues in 2012 were $39.4 trillion using the 2012 Economic Census of the United States. This was inflated to FY2015 dollars using the CPI–U. Table EC0700A1: All sectors: Geographic Area Series: Economy-Wide Key Statistics: 2007.

[314] Projected FY2015 payroll costs are estimated to be $878.5 billion. This projection is based on state and local payroll costs in 2012, which were reported in the Census of Governments data as $852 billion. This was inflated to FY2015 dollars using the CPI–U. 2012 Census of Governments: Employment Summary Report. Available at: *http://www2.census.gov/govs/apes/2012_summary_report.pdf.*

[315] State and local revenues in 2012 were reported by the Census as $3.0 trillion. This was inflated to FY2015 dollars using the CPI–U. U.S. Department of Commerce. (2014). 2012 Census of Governments: Finance— State and Local Government Summary Report. Available at: *http://www2.census.gov/govs/local/summary_report.pdf.*

While most tribal government commenters did not specifically address this aspect of the Department's proposal, the Chitimacha Tribe of Louisiana stated that annual automatic updating could negatively impact employee morale, increase burdens on tribal businesses (including its casino hotel), make it harder to estimate year-to-year costs, and "would be tantamount to Chitimacha being required to give its government and business enterprise salaried employees a raise every year or be forced to reclassify the worker as an hourly employee."

Some state and local government commenters specifically addressed the automatic updating alternatives discussed in the Department's proposal. The New Mexico State Personnel Board opposed both updating methods, stating that "the CPI–U measures purchasing power . . . [and not] the supply and demand of labor," and that the fixed percentile approach would "result in an accelerated upward movement of the [salary] threshold, as previously salaried workers are reclassified to hourly, or as they have their incomes increased to be over the new" threshold.

Other commenters appeared more receptive to automatic updating, provided the Department make certain changes from our proposal. The Georgia Department of Administrative Services and the Mississippi State Personnel Board stated that a wage index (rather than a price index) provided a more appropriate basis for automatic updates, although both commenters favored other changes including updating only every five years and, rather than a nationwide effective date, permitting employers to determine when updated salary levels would apply to their organizations. The Commonwealth of Virginia's Department of Human Resource Management (which supported a lower salary level) favored updating using "a measure such as the Employment Cost Index," while some state, local, and tribal governments that opposed aspects of the Department's rulemaking did not specifically address our automatic updating proposal. *See, e.g.,* City of Seward, Alaska; Elk Valley Rancheria Indian Tribe; Indiana Association of Cities and Towns; National League of Cities.

The Department concludes that the concerns raised by state, local, and tribal governments do not provide a basis for declining to institute automatic updating. We recognize that in some instances public sector employers may face different employment environments than their private sector counterparts. However, the Department believes that any unique burdens that automatic updating may pose for government employers are adequately mitigated by the Department's decision to automatically update the salary level every three years (instead of annually) and to increase from 60 to 150 days the notice before automatically updated salary levels take effect. Additionally, between updates all employers can access BLS data to estimate the likely size of the next updated salary level. These changes should provide government employers sufficient time and predictability to allow adaptation to, and compliance with, new salary levels. We also reiterate, as discussed in sections IV.E.ii.–iii, that nothing in this rulemaking requires employers to convert newly nonexempt employees to hourly status or reward underperforming employees with a raise. As to what method the Department should use to automatically update the salary level, commenters from State, local, and tribal governments generally raised the same points as non-government commenters. For the reasons already discussed at length, we conclude that automatic updating using the fixed percentile method will best ensure that the salary level continues to serve, in tandem with the duties test, as an effective dividing line between potentially exempt and nonexempt workers.

Some of commenters suggested that the Department failed to adequately consult with state, local, and tribal governments in developing the rule. For example, the State of Maine Department of Labor asserted that "USDOL did not reach out to all states to discuss the impacts this proposed rule change would have on the states." The Elk Valley Rancheria Indian Tribe asserted that "there has been no tribal consultation on this rule-making," and the Ute Mountain Ute Tribe stated that "the proposed rule will have a substantial and direct effect on the Tribe and is subject to consultation under Executive Order 13175." *See also, e.g.,* Gila River Indian Community; Confederated Tribes of the Umatilla Indian Reservation; Poarch Band of Creek Indians. Finally, some commenters, such as the Isle of Wight County, Virginia, urged the Department "to delay implementation" of the rule "until further analysis is done on the increased financial and administrative burdens it would place on county governments." The Department disagrees that there has been little or no tribal consultation or consultation with state and local governments on this rulemaking. As discussed above, the Department conducted an extensive outreach program, including several listening sessions that were specific to state, local, and tribal governments. Representatives from multiple states, local governments, and tribal governments participated in these listening sessions. In addition, the Department engaged associations representing governmental organizations such as: Interstate Labor Standards Association, National Association of Counties, National Association of Latino Elected and Appointed Officials, National Association of State Workforce Agencies, National Black Caucus of State Legislators, National Conference of State Legislatures, National Congress of American Indians, National Governors Association, National League of Cities, Progressive States Network, and the U.S. Conference of Mayors.

D. Least Burdensome Option or Explanation Required

The Department's consideration of various options has been described throughout the preamble and economic impact analysis (section VI). The Department believes that it has chosen the least burdensome but still cost-effective mechanism to update the salary level and index future levels that is also consistent with the Department's statutory obligation. Although some alternative options considered, such as inflating the 2004 standard salary level to FY2015 dollars resulting in a salary level of $570 per week, would have set the standard salary level at a rate lower than the updated salary level, which might impose lower direct payroll costs on employers, that outcome would not necessarily be the most cost-effective or least burdensome alternative for employers. A lower salary level—or a degraded stagnant level over time—would result in a less effective bright-line test for separating workers who may be exempt from those nonexempt workers intended to be within the Act's protection. A low salary level will also increase the role of the duties test in determining whether an employee is exempt, which would increase the likelihood of misclassification and, in turn, increase the risk that employees who should receive overtime and minimum wage protections under the FLSA are denied those protections.

Selecting a standard salary level inevitably impacts both the risk and cost of misclassification of overtime-eligible employees earning above the salary level as well as the risk and cost of providing overtime protection to employees performing bona fide EAP duties who are paid below the salary level. An unduly low level risks increasing employer liability from unintentionally misclassifying workers as exempt; but an unduly high standard salary level increases labor costs to employers precluded from claiming the exemption for employees performing bona fide EAP duties. Thus the ultimate cost of the regulation is increased if the standard salary level is set either too low or too high. The Department has determined that setting the standard salary level at the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region (currently the South) and automatically updating this level every three years best balances the risks and costs of misclassification of exempt status.

IX. Executive Order 13132 (Federalism)

The Department has reviewed this Final Rule in accordance with Executive Order 13132 regarding federalism, and determined that it does not have federalism implications. The Final Rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

X. Executive Order 13175, Indian Tribal Governments

The Department has reviewed this Final Rule under the terms of Executive Order 13175 and determined that it does not have "tribal implications." The Final Rule does not have "substantial direct effects on one or more Indian tribes, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes." As a result, no tribal summary impact statement has been prepared.

XI. Effects on Families

The undersigned hereby certifies that this Final Rule will not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act, 1999.

XII. Executive Order 13045, Protection of Children

Executive Order 13045 applies to any rule that (1) is determined to be "economically significant" as defined in Executive Order 12866, and (2) concerns an environmental health or safety risk that the promulgating agency has reason to believe may have a disproportionate effect on children. This Final Rule is not subject to Executive Order 13045 because it has no environmental health or safety risks that may disproportionately affect children.

XIII. Environmental Impact Assessment

A review of this Final Rule in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.;* the regulations of the Council on Environmental Quality, 40 CFR 1500 *et seq.;* and the Departmental NEPA procedures, 29 CFR part 11, indicates that the Final Rule will not have a significant impact on the quality of the human environment. As a result, there is no corresponding environmental assessment or an environmental impact statement.

XIV. Executive Order 13211, Energy Supply

This Final Rule is not subject to Executive Order 13211. It will not have a significant adverse effect on the supply, distribution, or use of energy.

XV. Executive Order 12630, Constitutionally Protected Property Rights

This Final Rule is not subject to Executive Order 12630, because it does not involve implementation of a policy "that has takings implications" or that could impose limitations on private property use.

XVI. Executive Order 12988, Civil Justice Reform Analysis

This Final Rule was drafted and reviewed in accordance with Executive Order 12988 and will not unduly burden the federal court system. The Final Rule was: (1) Reviewed to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct and to promote burden reduction.

List of Subjects in 29 CFR part 541

Labor, Minimum wages, Overtime pay, Salaries, Teachers, Wages.

David Weil,
Administrator, Wage and Hour Division.

PART 541—DEFINING AND DELIMITING THE EXEMPTIONS FOR EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL, COMPUTER AND OUTSIDE SALES EMPLOYEES

■ 1. The authority citation for part 541 is revised to read as follows:

Authority: 29 U.S.C. 213; Pub. L. 101–583, 104 Stat. 2871; Reorganization Plan No. 6 of 1950 (3 CFR, 1945–53 Comp., p. 1004); Secretary's Order 01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014).

■ 2. In § 541.100, revise paragraph (a)(1) to read as follows:

§ 541.100 General rule for executive employees.

(a) * * *

(1) Compensated on a salary basis pursuant to § 541.600 at a rate per week of not less than the 40th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census Region (or 84 percent of that amount per week, if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging or other facilities. Beginning January 1, 2020, and every three years thereafter, the Secretary shall update the required salary amount pursuant to § 541.607;

* * * * *

■ 3. In § 541.200, revise paragraph (a)(1) to read as follows:

§ 541.200 General rule for administrative employees.

(a) * * *

(1) Compensated on a salary or fee basis pursuant to § 541.600 at a rate per week of not less than the 40th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census Region (or 84 percent of that amount per week, if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging or other facilities. Beginning January 1, 2020, and every three years thereafter, the Secretary shall update the required salary amount pursuant to § 541.607;

* * * * *

■ 4. In § 541.204, revise paragraph (a)(1) to read as follows:

§ 541.204 Educational establishments.

(a) * * *

(1) Compensated on a salary or fee basis pursuant to § 541.600 at a rate per week of not less than the 40th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census Region (or 84 percent of that amount per week, if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging or other facilities; or on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment by which employed. Beginning January 1, 2020, and every three years thereafter, the Secretary shall update the required salary amount pursuant to § 541.607; and

* * * * *

■ 5. In § 541.300, revise paragraph (a)(1) to read as follows:

§ 541.300 General rule for professional employees.

(a) * * *

(1) Compensated on a salary or fee basis pursuant to § 541.600 at a rate per week of not less than the 40th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census Region (or 84 percent of that amount per week, if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging or other facilities. Beginning January 1, 2020, and every three years thereafter, the Secretary shall update the required salary amount pursuant to § 541.607; and

* * * * *

■ 6. In § 541.400, remove the first sentence in paragraph (b) introductory text and add three sentences in its place.

The additions read as follows:

§ 541.400 General rule for computer employees.

* * * * *

(b) The section 13(a)(1) exemption applies to any computer employee who is compensated on a salary or fee basis pursuant to § 541.600 at a rate per week of not less than the 40th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census Region (or 84 percent of that amount per week, if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging or other facilities. Beginning January 1, 2020, and every three years thereafter, the Secretary shall update the required salary amount pursuant to § 541.607. The section 13(a)(17) exemption applies to any computer employee compensated on an hourly basis at a rate of not less than $27.63 an hour. * * *

* * * * *

■ 7. Amend § 541.600 by removing the first sentence of paragraph (a) and adding three sentences in its place and revising paragraph (b).

The revisions and additions read as follows:

§ 541.600 Amount of salary required.

(a) To qualify as an exempt executive, administrative or professional employee under section 13(a)(1) of the Act, an employee must be compensated on a salary basis at a rate per week of not less than the 40th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census Region. As of December 1, 2016, and until a new rate is published in the **Federal Register** by the Secretary, such an employee must be compensated on a salary basis at a rate per week of not less than $913 (or $767 per week, if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging or other facilities. Beginning January 1, 2020, and every three years thereafter, the Secretary shall update the required salary amount pursuant to § 541.607. * * *

(b) The required amount of compensation per week may be translated into equivalent amounts for periods longer than one week. The requirement will be met if the employee is compensated biweekly on a salary basis of $1,826, semimonthly on a salary basis of $1,978, or monthly on a salary basis of $3,956. However, the shortest period of payment that will meet this compensation requirement is one week. Beginning January 1, 2020, and every three years thereafter, the Secretary shall update the required salary amount pursuant to § 541.607 and the updated salary amount may be paid weekly, biweekly, semimonthly, or monthly on a salaried basis.

* * * * *

■ 8. Amend § 541.601 by:
■ a. Revising paragraph (a);
■ b. Adding introductory text to paragraph (b);
■ c. Revising the first sentence of paragraph (b)(1); and
■ d. Revising paragraph (b)(2).

The revisions and additions read as follows:

§ 541.601 Highly compensated employees.

(a) An employee shall be exempt under section 13(a)(1) of the Act if:

(1) The employee receives total annual compensation of at least the annualized earnings amount of the 90th percentile of full-time nonhourly workers nationally; and

(2) The employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee identified in subpart B, C, or D of this part.

(b) As of December 1, 2016, and until a new amount is published in the **Federal Register** by the Secretary and becomes effective, such an employee must receive total annual compensation of at least $134,004. Beginning January 1, 2020, and every three years thereafter, the Secretary shall update the required total annual compensation amount pursuant to § 541.607.

(1) "Total annual compensation" must include at least a weekly amount equal to the required salary amount required by § 541.600(a) paid on a salary or fee basis as set forth in §§ 541.602 and 541.605, except that § 541.602(a)(3) shall not apply to highly compensated employees. * * *

(2) If an employee's total annual compensation does not total at least the minimum amount established in paragraph (a) of this section by the last pay period of the 52-week period, the employer may, during the last pay period or within one month after the end of the 52-week period, make one final payment sufficient to achieve the required level. For example, if the current annual salary level for a highly compensated employee is $134,004, an employee may earn $100,000 in base salary, and the employer may anticipate based upon past sales that the employee also will earn $35,000 in commissions. However, due to poor sales in the final quarter of the year, the employee actually only earns $10,000 in commissions. In this situation, the employer may within one month after the end of the year make a payment of at least $24,004 to the employee. Any such final payment made after the end of the 52-week period may count only toward the prior year's total annual compensation and not toward the total annual compensation in the year it was paid. If the employer fails to make such a payment, the employee does not qualify as a highly compensated employee, but may still qualify as exempt under subparts B, C, or D of this part.

* * * * *

■ 9. In § 541.602, revise paragraph (a) to read as follows:

(a) *General rule.* An employee will be considered to be paid on a "salary basis" within the meaning of this part if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

(1) Subject to the exceptions provided in paragraph (b) of this section, an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked. Exempt employees need not be paid for any workweek in which they perform no work.

(2) An employee is not paid on a salary basis if deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

(3) Up to ten percent of the salary amount required by § 541.600(a) may be satisfied by the payment of nondiscretionary bonuses, incentives, and commissions, that are paid quarterly or more frequently. If by the last pay period of the quarter the sum of the employee's weekly salary plus nondiscretionary bonus, incentive, and commission payments received does not equal 13 times the weekly salary amount required by § 541.600(a), the employer may make one final payment sufficient to achieve the required level no later than the next pay period after the end of the quarter. Any such final payment made after the end of the 13-week period may count only toward the prior quarter's salary amount and not toward the salary amount in the quarter it was paid. This provision does not apply to highly compensated employees under § 541.601.

* * * * *

■ 10. Revise § 541.604 to read as follows:

§ 541.604 Minimum guarantee plus extras.

(a) An employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis. Thus, for example, if the current weekly salary level is $913, an exempt employee guaranteed at least $913 each week paid on a salary basis may also receive additional compensation of a one percent commission on sales. An exempt employee also may receive a percentage of the sales or profits of the employer if the employment arrangement also includes a guarantee of at least $913 each week paid on a salary basis. Similarly, the exemption is not lost if an exempt employee who is guaranteed at least $913 each week paid on a salary basis also receives additional compensation based on hours worked for work beyond the normal workweek. Such additional compensation may be paid on any basis (*e.g.,* flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis), and may include paid time off.

(b) An exempt employee's earnings may be computed on an hourly, a daily or a shift basis, without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked, and a reasonable relationship exists between the guaranteed amount and the amount actually earned. The reasonable relationship test will be met if the weekly guarantee is roughly equivalent to the employee's usual earnings at the assigned hourly, daily or shift rate for the employee's normal scheduled workweek. Thus, for example, if the weekly salary level is $913, an exempt employee guaranteed compensation of at least $1,000 for any week in which the employee performs any work, and who normally works four or five shifts each week, may be paid $300 per shift without violating the salary basis requirement. The reasonable relationship requirement applies only if the employee's pay is computed on an hourly, daily or shift basis. It does not apply, for example, to an exempt store manager paid a guaranteed salary per week that exceeds the current salary level who also receives a commission of one-half percent of all sales in the store or five percent of the store's profits, which in some weeks may total as much as, or even more than, the guaranteed salary.

■ 11. In § 541.605, revise paragraph (b) to read as follows:

§ 541.605 Fee basis.

* * * * *

(b) To determine whether the fee payment meets the minimum amount of salary required for exemption under these regulations, the amount paid to the employee will be tested by determining the time worked on the job and whether the fee payment is at a rate that would amount to at least the minimum salary per week, as required by §§ 541.600(a) and 541.602(a), if the employee worked 40 hours. Thus, if the salary level were $913, an artist paid $500 for a picture that took 20 hours to complete meets the minimum salary requirement for exemption since earnings at this rate would yield the artist $1000 if 40 hours were worked.

■ 12. Add § 541.607 to read as follows:

§ 541.607 Automatic updates to amounts of salary and compensation required.

(a) *Standard salary level.* The amount required to be paid to an exempt employee on a salary or fee basis, as applicable, pursuant to §§ 541.100(a)(1), 541.200(a)(1), 541.204(a)(1), 541.300(a)(1), 541.400(b), 541.600(a)–(b), 541.601(b)(1), 541.604(a), and 541.605(b), is:

(1) $913 per week as of December 1, 2016; and

(2) Beginning on January 1, 2020, and every three years thereafter, updated to equal the 40th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census Region in the second quarter of the year preceding the update as published by the Bureau of Labor Statistics.

(b) *American Samoa.* The amount required to be paid to an exempt employee employed in American Samoa, on a salary or fee basis, pursuant to §§ 541.100(a)(1), 541.200(a)(1), 541.204(a)(1), 541.300(a)(1), 541.400(b), and 541.600(a), is:

(1) $767 per week as of December 1, 2016; and

(2) Beginning on January 1, 2020, and every three years thereafter:

(i) Updated to correspond to 84 percent of the updated salary set in paragraph (a)(2) of this section; and

(ii) Rounded to the nearest multiple of $1.00;

(3) Provided that when the highest industry minimum wage for American Samoa equals the minimum wage under 29 U.S.C. 206(a)(1), exempt employees employed in all industries in American Samoa shall be paid the rate specified in paragraph (a) of this section.

(c) *Motion picture producing industry.* The amount required to be paid to an exempt motion picture producing employee pursuant to § 541.709 is:

(1) $1,397 per week as of December 1, 2016; and

(2) Beginning on January 1, 2020, and every three years thereafter:

(i) Updated from the previously applicable base rate, adjusted by the same percentage as the updated salary set in paragraph (a)(2) of this section; and

(ii) Rounded to the nearest multiple of $1.00.

(d) The amount required in total annual compensation for an exempt highly compensated employee pursuant to § 541.601, is:

(1) $134,004 per year as of December 1, 2016; and

(2) Beginning on January 1, 2020, and every three years thereafter, updated to correspond to the annualized earnings amount of the 90th percentile of full-time nonhourly workers nationally in the second quarter of the year preceding the update as published by the Bureau of Labor Statistics.

(e) The Secretary will determine the lowest-wage Census Region for paragraphs (a) and (b) of this section using the 40th percentile of weekly earnings of full-time nonhourly workers in the Census Regions based on data from the Current Population Survey as published by the Bureau of Labor Statistics.

(f) The Secretary will use the 90th percentile of weekly earnings data of full-time nonhourly workers nationally based on data from the Current Population Survey as published by the

Bureau of Labor Statistics for paragraph (d) of this section.

(g) Not less than 150 days before the January 1st effective date of the updated earnings requirements for this section, the Secretary will publish a notice in the **Federal Register** stating the updated amounts for paragraphs (a) through (d) of this section.

(h) The Wage and Hour Division will publish and maintain on its Web site the applicable earnings requirements for employees paid pursuant to this part.

■ 13. Revise § 541.709 to read as follows:

§ 541.709 Motion picture producing industry.

The requirement that the employee be paid "on a salary basis" does not apply to an employee in the motion picture producing industry who is compensated, as of December 1, 2016, at a base rate of at least $1,397 per week (exclusive of board, lodging, or other facilities); and beginning on January 1, 2020, and every three years thereafter, is compensated at a base rate of at least the previously applicable base rate adjusted by the same ratio as the preceding standard salary level is increased (exclusive of board, lodging, or other facilities). Thus, an employee in this industry who is otherwise exempt under subparts B, C, or D of this part, and who is employed at a base rate of at least the applicable current minimum amount a week is exempt if paid a proportionate amount (based on a week of not more than 6 days) for any week in which the employee does not work a full workweek for any reason. Moreover, an otherwise exempt employee in this industry qualifies for exemption if the employee is employed at a daily rate under the following circumstances:

(a) The employee is in a job category for which a weekly base rate is not provided and the daily base rate would yield at least the minimum weekly amount if 6 days were worked; or

(b) The employee is in a job category having the minimum weekly base rate and the daily base rate is at least one-sixth of such weekly base rate.

[FR Doc. 2016–11754 Filed 5–18–16; 8:45 am]

BILLING CODE 4510–27–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
1985

FEDERAL REGISTER

Vol. 81 Monday,
No. 99 May 23, 2016

Part III

Department of Transportation

National Highway Traffic Safety Administration

23 CFR Part 1300
Uniform Procedures for State Highway Safety Grant Programs; Final Rule

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

23 CFR Part 1300

[Docket No. NHTSA–2016–0057]

RIN 2127–AL71

Uniform Procedures for State Highway Safety Grant Programs

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Interim final rule; request for comments.

SUMMARY: This action establishes revised uniform procedures implementing State highway safety grant programs, as a result of enactment of the Fixing America's Surface Transportation (FAST) Act. It also reorganizes, streamlines and updates some grant requirements. This document is being issued as an interim final rule to provide timely guidance to States about the application procedures for highway safety grants starting in year 2017. The agency requests comments on the rule. The agency will publish a notice responding to any comments received and, if appropriate, will amend provisions of the regulation.

DATES: This interim final rule is effective on May 23, 2016. Comments concerning this interim final rule are due October 31, 2016. In compliance with the Paperwork Reduction Act, NHTSA is also seeking comment on a revised information collection. See the Paperwork Reduction Act section under Regulatory Analyses and Notices below. Comments concerning the revised information collection requirements are due October 31, 2016 to NHTSA and to the Office of Management and Budget (OMB) at the address listed in the **ADDRESSES** section.

ADDRESSES: You may submit number identified in the heading of this document by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, M–30, U.S. Department of Transportation, West Building, Ground Floor, Rm. W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., between 9 a.m. and 5 p.m. Eastern Time, Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

Regardless of how you submit your comments, please mention the docket number of this document.

You may also call the Docket at 202–366–9324.

Comments regarding the revised information collection should be submitted to NHTSA through one of the preceding methods and a copy should also be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725–17th Street NW., Washington, DC 20503, Attention: NHTSA Desk Officer.

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the Supplementary Information section of this document. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Privacy Act: Please see the Privacy Act heading under Regulatory Analyses and Notices.

FOR FURTHER INFORMATION CONTACT:

For program issues: Barbara Sauers, Director, Office of Grants Management and Operations, Regional Operations and Program Delivery, National Highway Traffic Safety Administration, Telephone number: (202) 366–0144; Email: *barbara.sauers@dot.gov.*

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I. Executive Summary

On July 6, 2012, the President signed into law the "Moving Ahead for Progress in the 21st Century Act" (MAP–21), Public Law 112–141, which restructured and made various substantive changes to the highway safety grant programs administered by the National Highway Traffic Safety Administration (NHTSA). NHTSA issued an interim final rule (IFR) implementing the MAP–21 provisions and sought public comment. 78 FR 4986 (Jan. 23, 2013). Because MAP–21 was a two-year authorization with short extensions, the agency did not have an opportunity to address the comments received in response to the MAP–21 IFR.

On December 4, 2015, the President signed into law the Fixing America's Surface Transportation Act (FAST Act), Public Law 114–94, the first authorization enacted in over ten years that provides long-term funding certainty for surface transportation. The FAST Act amended NHTSA's highway safety grant program (23 U.S.C. 402 or Section 402) and the National Priority Safety Program grants (23 U.S.C. 405 or Section 405), and it restored a small grant from a previous authorization. The FAST Act requires NHTSA to award grants pursuant to rulemaking. Today's action implements the FAST Act provisions, taking into account comments received in response to the MAP–21 IFR.

Unlike MAP–21, the FAST Act did not significantly change the structure of the grant programs. The FAST Act primarily made targeted amendments to the existing grant programs, providing more flexibility for States to qualify for some of the grants. Specifically, the FAST Act made limited administrative changes to the Section 402 grant program and made no changes to the contents of the Highway Safety Plan. However, the FAST Act made the following changes to the Section 405 grant program:

- Occupant Protection Grants—no substantive changes
- State Traffic Safety Information System Improvements Grants—no substantive changes
- Impaired Driving Countermeasures Grants—no substantive changes
- Motorcyclist Safety Grants—no substantive changes
- Alcohol-Ignition Interlock Law Grants—Added flexibility for States to qualify for grants
- Distracted Driving Grants—Added flexibility for States to qualify for grants
- State Graduated Driver Licensing Incentive Grants—Added flexibility for States to qualify for grants
- 24–7 Sobriety Programs Grants—Established a new grant
- Nonmotorized Safety Grants—Established a new grant

In addition, the FAST Act restored (with some changes) the racial profiling grant authorized under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Sec. 1906, Public Law 109–59 (Section 1906).

The FAST Act requires NHTSA to award highway safety grants pursuant to rulemaking. In order to provide States with as much advance time as practicable to prepare grant applications and to ensure the timely award of all grants, the agency is proceeding with an expedited rulemaking. Accordingly, NHTSA is publishing this rulemaking as an IFR, with immediate effectiveness, to implement the application and administrative requirements of the highway safety grant programs.

This IFR sets forth the application, approval, and administrative requirements for all 23 U.S.C. Chapter 4 grants and the Section 1906 grants. Section 402, as amended by the FAST Act, continues to require each State to have an approved highway safety program designed to reduce traffic crashes and the resulting deaths, injuries, and property damage. Section 402 sets forth minimum requirements with which each State's highway safety program must comply. Under existing procedures, each State must submit for NHTSA approval an annual Highway Safety Plan (HSP) that identifies highway safety problems, establishes performance measures and targets, and describes the State's countermeasure strategies and projects to achieve its performance targets. (23 U.S.C. 402(k)) The agency is making several specific amendments to the HSP contents to foster consistency across all States and to facilitate the electronic submission of HSPs required under the FAST Act. (23 U.S.C. 402(k)(3))

As noted above, the FAST Act made no substantive changes to many of the National Priority Safety Program grants, provided additional qualification flexibility for others, and established new grants. For grants without substantive changes (Occupant Protection Grants, State Traffic Safety Information System Improvements Grants, Impaired Driving Countermeasures Grants and Motorcyclist Safety Grants), the agency is simply aligning the application requirements with the HSP requirements under Section 402 to streamline and ease State burdens in applying for Section 402 and 405 grants. For Section 405 grants with additional flexibility (Alcohol-Ignition Interlock Law Grants, Distracted Driving Grants and Stated Graduated Driver Licensing Incentive Grants) and for the new grants (24–7 Sobriety Program Grants, Nonmotorized Grants and Racial Profiling Data Collection Grants), where the FAST Act identified specific qualification requirements, today's action adopts the statutory language with limited changes. The agency is also aligning the application requirements for these grants with the HSP requirements.

While many procedures and requirements continue unchanged by today's action, this IFR makes limited changes to administrative provisions to address changes in the HSP and changes made by the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 CFR part 200.

Finally, this IFR recodifies 23 CFR part 1200 at 23 CFR part 1300, the part associated with NHTSA programs. The section numbers remain largely the same as before except for the change from 1200 to 1300. (For example, Sec. 1200.3 Definitions becomes Sec. 1300.3 Definitions, Sec. 1200.11 Contents (Highway Safety Plan) becomes Sec. 1300.11 Contents (Highway Safety Plan), etc.) In this preamble, all references are to part 1300 instead of the corresponding part 1200.

The FAST Act retained the MAP–21 requirement for a consolidated single application due by July 1 of the fiscal year preceding the fiscal year of the grant. (23 U.S.C. 402(k)(2) and 402(k)(3)) Therefore, for fiscal year 2017 and subsequent fiscal years, the application deadline remains July 1 prior to the fiscal year of the grant. Because of the short timeframe between today's action and the July 1 application deadline, the agency is taking the following approach to ease the application burden on States. For those programs without substantive changes (Occupant Protection, State Traffic Safety Information System Improvements, Impaired Driving Countermeasures, and Motorcyclist Safety), we are delaying the requirement for States to follow the new regulatory process until fiscal year 2018 grant applications. For these grants, States may follow the application requirements in 23 CFR part 1200, switching to the part 1300 requirements for fiscal year 2018 grants and thereafter. (To provide maximum advance notice, the agency informed States of this option in a March 31, 2016 letter.) However, for grants with substantive changes (Alcohol-Ignition Interlock Laws, Distracted Driving, and State Graduated Driver Licensing) and for new grants (24–7 Sobriety Program, Nonmotorized Safety, and Racial Profiling Data Collection), States must follow the application requirements in today's IFR at 23 CFR part 1300, commencing with fiscal year 2017 grant applications. For additional flexibility, States may elect to follow the new, more streamlined procedures (*i.e.*, the part 1300 requirements) for fiscal year 2017 grant applications for the former group of grants as well (*i.e.*, those without substantive changes). In all cases, the requirements under 23 CFR part 1300 to submit grant application and administration information through the Grants Management Solutions Suite (discussed below) will not apply until FY 2018 applications, when that system becomes fully functional.

In this IFR, the agency also responds to comments from the MAP–21 IFR. Because MAP–21 was a two-year authorization with multiple short extensions, the agency did not have the opportunity to address comments. Those comments are now addressed within the relevant sections below and in Section VII below.

For ease of reference, the preamble identifies in parentheses within each subheading and at appropriate places in the explanatory paragraphs the new CFR citation for the corresponding regulatory text.

II. General Provisions

A. Definitions. (23 CFR 1300.3)

This IFR adds definitions for the following terms: Annual report file, countermeasure strategy, data-driven, evidence-based, fatality rate, Fatality Analysis Reporting System, final FARS, five-year rolling average, number of fatalities, number of serious injuries, performance measure, performance target, Section 1906, and serious injuries. Most of these terms and definitions are generally understood by States. Today's action also amends a few definitions, such as those for program area and project, to clarify and distinguish terms that often have been used interchangeably. These amended definitions will help provide consistency across all State HSPs. Finally, this IFR deletes the term "Approving Official" and replaces it with "Regional Administrator," used throughout this part.

B. State Highway Safety Agency. (23 CFR 1300.4)

Today's action updates the authorities and functions of the State Highway Safety Agency, also referred to as the State Highway Safety Office. While the IFR explicitly adds the duty to manage Federal grant funds in accordance with all Federal and State requirements, this is not a new obligation of State Highway Safety Offices, but rather one that has always been required. Consistent with the Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Awards, 2 CFR part 200, the agency is adding the requirement that State Highway Safety Offices must conduct a risk assessment of subrecipients and monitor subrecipients based on risk.

III. Highway Safety Plan

MAP–21 made significant changes to highway safety programs under 23 U.S.C. Chapter 4. It required a performance-based Highway Safety Plan with performance measures and targets. (23 U.S.C. 402(k)) Prior to MAP–21, there was a clear separation between the "Highway Safety Performance Plan," where States included performance measures and targets, and the "Highway Safety Plan," where States developed projects and activities to implement the highway safety program. MAP–21 consolidated these requirements under the Highway Safety Plan, where the performance plan was an element of the development of the State highway safety program.

In addition to establishing a performance-based HSP, MAP–21 established the HSP as the single, consolidated application for all highway safety grants under 23 U.S.C. Chapter 4. While the MAP–21 IFR established the beginnings of a single, consolidated application, today's action more fully integrates the Section 402 and Section 405 programs, establishing the HSP as the State's single planning document accounting for all behavioral highway safety activities.

This IFR clarifies the HSP content (highway safety planning process, performance measures and targets, and countermeasure strategies and projects), so that these elements may also serve as a means to fulfill some of the application requirements for certain Section 405 grants. By creating a link between the HSP content requirements provided in Section 402 and the Section 405 grant application requirements, this IFR streamlines the NHTSA grant application process and relieves some of the burdens associated with the previous process.

The FAST Act amended Section 402 to require NHTSA to develop procedures to allow States to submit highway safety plans, including any attachments to the plans, in electronic form. (23 U.S.C. 402(k)(3)) NHTSA intends to implement this provision of the FAST Act with the Grants Management Solutions Suite (GMSS) beginning with fiscal year 2018 grants, as discussed in more detail below. GMSS is the improved and enhanced electronic system that States will use to submit the HSP to apply for grants, receive grant funds, make amendments to the HSP throughout the fiscal year, manage grant funds and invoice expenses. This electronic system will replace the Grants Tracking System that States currently use to receive grant funds and invoice expenses.

A. General

The Highway Safety Act of 1966 (23 U.S.C. 401 *et seq.*) established a formula grant program to improve highway safety in the United States. As a condition of the grant, States must meet certain requirements contained in Section 402. The FAST Act made limited administrative changes to Section 402 requirements and made no changes to the contents of the Highway Safety Plan. Section 402(a) continues to require each State to have a highway safety program, approved by the Secretary of Transportation (delegated to NHTSA), which is designed to reduce traffic crashes and the resulting deaths, injuries, and property damage from those crashes. Section 402(a) also continues to require State highway safety programs to comply with uniform guidelines promulgated by the Secretary.

Section 402(b), which sets forth the minimum requirements with which each State highway safety program must comply, requires the HSP to provide for a data-driven traffic safety enforcement program to prevent traffic violations, crashes, and crash fatalities and injuries in areas most at risk for such incidents. Section 402(b) continues to require each State to coordinate its HSP, data collection, and information systems with the State strategic highway safety plan as defined in 23 U.S.C. 148(a). This requirement to coordinate these elements into a unified State approach to highway safety promotes comprehensive transportation and safety planning and program efficiency in the States. Coordinating the HSP planning process with the programs of other DOT agencies, where possible, will ensure alignment of State performance targets where common measures exist, such as for fatalities and serious injuries. States are encouraged to use data to identify performance measures beyond these consensus performance measures (*e.g.,* distracted driving, bicycles). NHTSA collaborated with other DOT agencies to promote alignment among performance measures, and that alignment is reflected in this IFR.

B. Highway Safety Plan Contents

The FAST Act retained the significant changes in MAP–21 for States to develop performance-based highway safety programs. Beginning with fiscal year 2014 HSPs, States provided additional information in the HSP to meet the performance-based, evidence-based requirements of MAP–21. This IFR reorganizes and further refines the information provided in the MAP–21 IFR to help streamline the HSP content requirements and align them with the Section 405 grant requirements.

In response to the MAP–21 IFR, one commenter asked why two separate plans were required, and recommended a single highway safety performance plan, the first part describing processes used to develop the plan and the second part describing a detailed spending plan. The change required under MAP–21 did not create two plans. Rather, under MAP–21, the HSP is the only plan that the State submits as its application for highway safety grants. The required content of the HSP includes a description of the highway safety planning process, a performance plan identifying performance measures and targets, and countermeasure strategies and projects. These content requirements encourage the linkage of each step of the planning process: Problem identification linked to data driven performance measures and targets, followed by countermeasure strategies and projects to achieve those targets. The "performance plan" is an integral part of the HSP. The agency believes that MAP–21 made it clear that problem identification and performance measures drive the specific projects and activities in the HSP.

1. Highway Safety Planning Process. (23 CFR 1300.11(a))

Today's action reorganizes and clarifies the section of the HSP that describes the State's highway safety planning process. As in the MAP–21 IFR, the State must describe data sources and processes used to develop its highway safety program, including problem identification, description of performance measures, establishment of performance targets, and selection of countermeasure strategies and projects. This section continues to require identification of participants in the planning process, the data sources consulted, and the results of coordination of the HSP with the State HSIP. This IFR clarifies that this section of the HSP must also include a description of the State's problems and methods for project selection. These elements are a typical part of the State highway safety planning process.

2. Performance Report. (23 CFR 1300.11(b))

This requirement is unchanged from the one codified at 23 CFR 1200.11(d). States should review and analyze the previous year's HSP as part of the development of a data-driven HSP. As required in the MAP–21 IFR, States must provide a program-area-level report on their success in meeting performance targets. The agency believes that such information is valuable in the development of the HSP. If a State has not met its performance targets in the previous year's HSP, today's action also requires the State to describe how it will adjust the upcoming HSP to better meet performance targets. However, the agency believes that States should continuously evaluate and change their HSP to meet the statutory requirement that the highway safety program be "designed to reduce traffic crashes and the resulting deaths, injuries, and property damage from those crashes."

3. Performance Plan. (23 CFR 1300.11(c))

MAP–21 specified that HSPs must contain the performance measures identified in "Traffic Safety Performance Measures for States and Federal Agencies" (DOT HS 811 025), jointly developed by NHTSA and the Governors Highway Safety Association (GHSA). NHTSA and GHSA agreed on a minimum set of performance measures to be used by States and federal agencies in the development and implementation of behavioral highway safety plans and programs. An expert panel from NHTSA, the Federal Highway Administration (FHWA), the Federal Motor Carrier Safety Administration, State highway safety offices, academic and research organizations, and other key groups assisted in developing these measures. Originally, 14 measures were established. In accordance with MAP–21, NHTSA and GHSA coordinated to identify a new performance measure—bicyclist fatalities. Currently, States report on 15 measures—11 core outcome measures,[1] one core behavior measure,[2] and three activity measures[3]—that cover the major areas common to HSPs, using existing data systems. (23 U.S.C. 402(k)) This minimum set of performance measures addresses most of the National Priority Safety Program areas, but it does not address all of the possible highway safety problems in a State or all of the National Priority Safety Programs specified in Section 405. For highway safety problems identified by the State or relevant to a particular Section 405 grant application, and for which consensus performance measures have not been identified (*e.g.,* distracted driving and bicycles), this IFR clarifies the existing requirements for States to develop their own evidence-based performance measures.

MAP–21 provided additional linkages between NHTSA-administered programs and the programs of other DOT agencies coordinated through the State strategic highway safety plan (SHSP) administered by FHWA, as defined in 23 U.S.C. 148(a). NHTSA and FHWA collaborated to harmonize three common performance measures across the programs of the two agencies (fatalities, fatality rate, and serious injuries) to ensure that the highway safety community is provided uniform measures of progress. Today's action aligns the State performance measures and targets that are common to both NHTSA and FHWA. Consistent with FHWA's rulemaking on performance measures (81 FR 13882, Mar. 15, 2016), today's action requires that performance measures use 5-year rolling averages and that the performance targets for the three common performance measures be identical to the State DOT targets reported in the Highway Safety Improvement Program (HSIP) annual report, as coordinated through the SHSP.

The 5-year rolling average is calculated by adding the number of fatalities or the number of serious injuries, as they pertain to the performance measure, for the most recent 5 consecutive calendar years ending in the year for which the targets are established. The annual report file (ARF) for FARS may be used, but only if final FARS is not yet available. The sum of the fatalities or the serious injuries is divided by five and then rounded to the tenth decimal place for the fatality number and the serious injury number. The fatality rate is determined by calculating the number of fatalities per vehicle mile traveled for each of the five years, dividing by five, and then rounding to the thousandth decimal place.

States must report serious injuries using the Model Minimum Uniform Crash Criteria (MMUCC) Guideline, 4th Edition by April 15, 2019. States may use serious injuries coded as "A" on the KABCO[4] injury classification scale, through use of the conversion tables developed by NHTSA, until April 15, 2019. After that date, all States must use "suspected serious injury (A)" as defined in the MMUCC, 4th Edition. This requirement will provide for greater consistency in the reporting of serious injuries and allow for better communication of serious injury data at the national level. For clarity, NHTSA also adds a definition for serious injuries and number of serious injuries. Consistent with the FHWA rulemaking on performance measures, the "number of serious injuries" performance measure must account for crashes involving a motor vehicle traveling on a public road, which is consistent with FARS. State crash databases may contain serious injury crashes that did not involve a motor vehicle. In order to make the data consistent for the performance measures, States will only report serious injury crashes that involved a motor vehicle.

A number of commenters to the MAP–21 IFR recommended that the agency include performance measures for bicycle and pedestrian fatalities and injuries. Since fiscal year 2014, States have been required to report on a performance measure for the number of pedestrian fatalities, as provided in the "Traffic Safety Performance Measures for States and Federal Agencies." As noted earlier, NHTSA and GHSA collaborated to identify a new performance measure—bicyclist fatalities—on which States must report beginning with fiscal year 2015 HSPs. (23 U.S.C. 402(k)) While this IFR does not require performance measures for bicycle and pedestrian serious injuries, the agency refers commenters to FHWA's new non-motorized performance measure for the number of combined non-motorized fatalities and non-motorized serious injuries in a State.

One commenter stated that the requirement for GHSA coordination acted as a limitation on the performance measures that could be required by NHTSA. The statute requires NHTSA to coordinate with GHSA in making revisions to the set of required performance measures (23 U.S.C.

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[1] States set goals and report progress on the following outcome measures: Number of traffic fatalities (FARS); Number of serious injuries in traffic crashes (State crash data files); Fatalities/VMT (FARS, FHWA); Number of unrestrained passenger vehicle occupant fatalities, all seat positions (FARS); Number of fatalities in crashes involving a driver or motorcycle operator with a BAC of .08 and above (FARS); Number of speeding-related fatalities (FARS); Number of motorcyclist fatalities (FARS); Number of unhelmeted motorcyclist fatalities (FARS); Number of drivers age 20 or younger involved in fatal crashes (FARS); Number of pedestrian fatalities (FARS); and Number of bicyclist fatalities (FARS).

[2] States set goals and report progress on one behavior core measure—observed seat belt use for passenger vehicles, front seat outboard occupants (survey).

[3] States report on the following activity core measures: Number of seat belt citations issued during grant-funded enforcement activities (grant activity reporting); Number of impaired driving arrests made during grant-funded enforcement activities (grant activity reporting); Number of speeding citations issued during grant-funded enforcement activities (grant activity reporting).

[4] KABCO refers to the coding convention system for injury classification established by the National Safety Council.

402(k)), and NHTSA does not intend to impose additional performance measures without such coordination. For example, NHTSA and GHSA worked quickly to develop the new bicyclist fatalities performance measure to address this growing highway safety problem.

4. Highway Safety Program Area Problem Identification, Countermeasure Strategies, Projects and Funding. (23 CFR 1300.11(d))

The Federal statute requires the State to describe its strategies in developing its countermeasure programs and selecting the projects to allow it to meet the highway safety performance targets. The HSP must continue to include a description of the countermeasure strategies and projects the State plans to implement to reach the performance targets identified by the State in the HSP. Today's action reorganizes and clarifies these requirements.

For each Program Area, the HSP must describe the countermeasure strategies and the process (including data analysis) for selecting that countermeasure strategy and the corresponding projects. At a minimum, the HSP must describe the overall projected traffic safety impacts, just as the MAP–21 regulation required. The HSP must also link the countermeasure strategies to the problem identification data, performance targets and allocation of the funds to projects. One commenter to the MAP–21 IFR was concerned that this is beyond what was mandated by MAP–21. Section 402(k)(e)(B) required then and still requires the contents of the HSP to include "a strategy for programing funds apportioned to the State under this section on projects and activities that will allow the State to meet the performance targets . . . ." An overall assessment of the impact of chosen strategies provides the necessary evidence and justification to support the projects and activities selected by the State to achieve its performance targets. In order to develop a program to achieve its targets, the State needs to conduct such an assessment or analysis. Accordingly, today's action retains this requirement from the MAP–21 IFR.

For each countermeasure strategy, the HSP must also provide project level information, including identification of project name and description, subrecipient/contractor, funding sources, funding amounts, amount for match, indirect cost, local benefit and maintenance of effort (as applicable), project number, and funding code. Finally, for each countermeasure strategy, the HSP must include data analysis to support the effectiveness of the selected countermeasure strategy. A number of States already include much of this information, but today's action now requires this information to promote uniformity among HSPs and also to allow the agency to implement the GMSS for the electronic submission of HSPs. The agency anticipates that beginning in fiscal year 2018 States will be able to enter this information in the GMSS as part of the HSP.

NHTSA does not intend to discourage innovative countermeasures, especially where few established countermeasures currently exist, such as in distracted driving. Innovative countermeasures that may not be fully proven but that show promise based on limited practical application are encouraged when a clear data-driven safety need has been identified. As evidence of potential success, justification of new countermeasures can also be based on the prior success of specific elements from other effective countermeasures.

The FAST Act continues the requirement for States to include a description of their evidence-based traffic safety enforcement program to prevent traffic violations, crashes, crash fatalities, and injuries in areas most at risk for crashes. Today's action clarifies this requirement and allows States to cross-reference existing projects in the HSP to demonstrate an evidence-based traffic safety enforcement program. Allowing States to cross-reference projects identified under countermeasure strategies will alleviate the burden of duplicative entries.

The FAST Act continues the requirement that a State must provide assurances that it will implement activities in support of national high-visibility law enforcement mobilizations coordinated by the Secretary of Transportation. In addition to providing such assurances, the State must describe in its HSP the planned high-visibility enforcement strategies to support national mobilizations for the upcoming grant year and provide information on those activities. Based on requests to define the level of participation required, today's notice clarifies this requirement. For example, the FAST Act requires NHTSA to implement three high-visibility enforcement campaigns on impaired driving and occupant protection each year. (23 U.S.C. 404) States are required to support these three campaigns as a condition of a Section 402 grant. NHTSA intends to identify the specific dates of the national mobilizations and provide programmatic ideas and resources for the campaigns on *www.trafficsafetymarketing.gov.*

Under the MAP–21 IFR, States submitted as part of their HSP a program cost summary (HS Form 217) and a list of projects (including an estimated amount of Federal funds for each project) that the State proposed to conduct in the upcoming fiscal year to meet the performance targets identified in the HSP. States were required to keep the project list up-to-date and to include identifying project numbers for each project on the list. Today's action eliminates the HS Form 217 and the corresponding list of projects beginning with fiscal year 2018 grants, but not the reporting requirement. Instead, States will be required to provide project information electronically in the GMSS. This will allow States to rely on project information in the HSP to apply for some Section 405 grants without providing duplicative information. States will be able to cross reference the information in their Section 405 application.

The FAST Act continues the Teen Traffic Safety Program that provides for Statewide efforts to improve traffic safety for teen drivers. States may elect to incorporate such a Statewide program as an HSP program area. If a State chooses to do so, it must include project information related to the program in the HSP.

Finally, the FAST Act continues the "single application" requirement that State applications for Section 405 grants be included in the HSP submitted on July 1 of the fiscal year preceding the fiscal year of the grant. Today's action also requires the Section 1906 grant application to be submitted as part of the HSP. As under the MAP–21 IFR, States will continue to submit certifications and assurances for all 23 U.S.C. Chapter 4 and Section 1906 grants, signed by the Governor's Representative for Highway Safety, certifying the HSP application contents and providing assurances that they will comply with applicable laws and regulations, financial and programmatic requirements and any special funding conditions. Only the Governor's Representative for Highway Safety may sign the certifications and assurances required under this IFR. The Certifications and Assurances will now be included as appendices to this part.

C. Review and Approval Procedures. (23 CFR 1300.14)

Effective October 1, 2016, the FAST Act specifies that NHTSA must approve or disapprove the HSP within 45 days after receipt. This provision will be implemented with fiscal year 2018 grant applications. (See Section VI.) As in past practice, NHTSA may request additional information from a State regarding the contents of the HSP to determine whether the HSP meets statutory, regulatory and programmatic requirements. To ensure that HSPs are approved or disapproved within 45 days, States must respond promptly to NHTSA's request for additional information. Failure to respond promptly may delay approval and funding of the State's Section 402 grant.

Within 45 days, the Regional Administrator will approve or disapprove the HSP, and specify any conditions to the approval. If the HSP is disapproved, the Regional Administrator will specify the reasons for disapproval. The State must resubmit the HSP with the necessary modifications to the Regional Administrator. The Regional Administrator will notify the State within 30 days of receipt of the revised HSP whether it is approved or disapproved.

NHTSA will also complete review of Section 405 grant applications within 45 days and notify States of grant award amounts early in the fiscal year. Because the calculation of Section 405 grant awards depends on the number of States meeting the qualification requirements, States must respond promptly to NHTSA's request for additional information or face disqualification from consideration for a Section 405 grant. The agency does not intend to delay grant awards to States that comply with grant submission procedures due to the inability of other States to meet submission deadlines.

D. Apportionment and Obligation of Grant Funds. (23 CFR 1300.15)

The provisions in the MAP–21 IFR regarding the apportionment and obligation of grant funds remain largely unchanged. As discussed above, the agency will replace the HS Form 217 so that States can enter the information directly in the GMSS. States will be able to use the GMSS to obligate and voucher for expenses as well as to amend the HSP throughout the fiscal year. beginning with fiscal year 2018 grants.

IV. National Priority Safety Program and Racial Profiling Data Collection.

Under this heading, we describe the requirements set forth in today's action for the grants under Section 405—Occupant Protection, State Traffic Safety Information System Improvements, Impaired Driving Countermeasures, Distracted Driving, Motorcyclist Safety, State Graduated Driver Licensing Incentive and Nonmotorized Safety— and the Section 1906 grant—Racial Profiling Data Collection. The subheadings and explanatory paragraphs contain references to the relevant sections of this IFR where a procedure or requirement is implemented, as appropriate.

A. General. (23 CFR 1300.20)

Some common provisions apply to most or all of the grants authorized under Sections 405 and 1906. The agency is retaining most of these provisions without substantive change in this IFR—definitions (§ 1300.20(b)); qualification based on State statutes (§ 1300.20(d)); and matching (§ 1300.20(f)).

1. Eligibility and Application. (23 CFR 1300.20(c))

The eligibility provision in this IFR remains unchanged from the MAP–21 IFR. For all but the Motorcyclist Safety Grant program, eligibility under Section 405 and Section 1906 is controlled by the definition of "State" under 23 U.S.C. 401, which includes the 50 States, the District of Columbia, Puerto Rico, American Samoa, the Commonwealth of the Northern Mariana Islands, Guam and the U.S. Virgin Islands. For the Motorcyclist Safety grants, the 50 States, the District of Columbia and Puerto Rico are eligible to apply. This IFR, however, adds a provision related to general application requirements for Section 405 and Section 1906 grants. Specifically, in its application for Section 405 or Section 1906 grants, a State must identify specific page numbers in the HSP if it is relying on information in the HSP as part of its application for those programs. For example, if a State is relying on the occupant protection program area of the HSP to demonstrate problem identification, countermeasure strategies and specific projects required to meet the qualification requirements for an occupant protection plan (§ 1300.21(d)(1)), it must provide specific page numbers for the occupant protection program area in the HSP in its application for the Section 405 Occupant Protection Grant.

2. Award Determination and Transfer of Funds. (23 CFR 1300.20(e))

The FAST Act made changes conforming the grant allocations under Section 405. For all Section 405 grants except State Graduated Driver Licensing Incentive Grants, grant awards will be allocated in proportion to the State's apportionment under Section 402 for fiscal year 2009. For Section 1906, the FAST Act does not specify how the grant awards are to be allocated. For consistency with the other grants, and in accordance with past practice, NHTSA will allocate Section 1906 grant awards in the same manner. The FAST Act specifies a different treatment for State Graduated Driver Licensing Incentive Grant awards, which must be allocated in proportion to the State's apportionment under Section 402 for the particular fiscal year of the grant.

In determining grant awards, NHTSA will apply the apportionment formula under 23 U.S.C. 402(c) to all qualifying States, in proportion to the amount each such State receives under 23 U.S.C. 402(c), so that all available amounts are distributed to qualifying States to the maximum extent practicable. (§ 1300.20(e)(1)) However, the IFR provides that the amount of an award for each grant program may not exceed 10 percent of the total amount made available for that grant programs (except for the Motorcyclist Safety Grant and the Racial Profiling Data Collection Grant, which have a different limit imposed by statute). This limitation on grant amounts is necessary to prevent unintended large distributions to a small number of States in the event only a few States qualify for a grant award. (§ 1300.20(e)(2))

In the event that all funds authorized for Section 405 grants are not distributed, the FAST Act authorizes NHTSA to transfer the remaining amounts before the end of the fiscal year for expenditure under the Section 402 program. (23 U.S.C. 405(a)(8)) In accordance with this provision, NHTSA will transfer any unawarded Section 405 grant funds to the Section 402 program, using the apportionment formula. (§ 1300.20(e)(3)) In the event that all grant funds authorized for Section 1906 grants are not distributed, the FAST Act does not authorize NHTSA to reallocate unawarded Section 1906 funds to other State grant programs. Rather, any such funds will be returned for use under 23 U.S.C. 403, and do not fall within the scope of this IFR.

B. Maintenance of Effort. (23 CFR 1300.21, 1300.22 and 1300.23)

Under MAP–21, States were required to provide an assurance that they would maintain their aggregate expenditures from all sources within the State. The FAST Act amended this provision to focus only on State level expenditures, making compliance easier for States. The applicable provision now requires the lead State agency for occupant protection programs, impaired driving programs and traffic safety information system improvement programs to maintain its aggregate expenditures for those programs at or above the average level of such expenditures in fiscal years 2014 and 2015 ("maintenance of effort" requirement). As under MAP–21, the agency has the authority to waive or modify this requirement for not more than one fiscal year. However, since the FAST Act makes compliance with the maintenance of effort requirement easier, waivers will be granted to States only under exceptional or uncontrollable circumstances. Maintenance of effort requirements have been a feature of these grants for many years, and States should not expect to receive waivers. We expect the State highway safety agency to plan for and meet these requirements each year.

In response to the MAP–21 IFR, two commenters requested guidance on maintenance of effort, stating that it was difficult for States to assure that local resources were maintained. The requirement for maintenance of effort to include local resources was a feature of MAP–21. As noted above, the FAST Act amendment limits the level of effort determination to the lead State agency responsible for the applicable programs.

C. Occupant Protection Grants. (23 CFR 1300.21)

The FAST Act continues the MAP–21 Occupant Protection Grants with only one substantive amendment regarding the use of funds by high seat belt use rate States. Today's IFR makes changes to effect the amendment. High belt use rate States are now permitted to use up to 100 percent of their Occupant Protection funds for any project or activity eligible for funding under section 402.

This IFR also amends program requirements to streamline the application and review process. Commenters to the MAP–21 IFR have noted, and the agency recognizes, that some Occupant Protection application materials are already required as part of the State's annual Highway Safety Plan. Today's notice addresses this consideration, where feasible, by directing States in their Occupant Protection application to cite to page numbers in the HSP containing descriptions and lists of projects and activities, in lieu of providing separate submissions.

1. Eligibility Determination. (23 CFR 1300.21(c))

Under the Occupant Protection Grant program, an eligible State can qualify for grant funds as either a high seat belt use rate State or a lower seat belt use rate State. A high seat belt use rate State is a State that has an observed seat belt use rate of 90 percent or higher; a lower seat belt use rate State is a State that has an observed seat belt use rate lower than 90 percent. Today's IFR retains the eligibility determination in the MAP–21 IFR.

2. Qualification Requirements for All States

To qualify for an Occupant Protection Grant, all States must meet several requirements. The agency is updating and amending some of these requirements to streamline application requirements, in light of information already provided in the HSP.

i. Occupant Protection Plan. (23 CFR 1300.21(d)(1))

The agency is amending this criterion to require States to submit an occupant protection plan each fiscal year, but the requirement may be satisfied by submissions typically included in the HSP.[5] Under the MAP–21 IFR, States were required to submit an occupant protection plan in the first fiscal year (FY 2013) and provide updates to the plan in subsequent years. States were also required to submit an occupant protection program area plan in the HSP under 23 CFR 1200.11. The occupant protection program area in the HSP contains many of the same elements included in an occupant protection plan, such as problem identification, countermeasure strategies and projects to meet performance targets. This occupant protection program area is a continuing requirement in the HSP under § 1300.11. For this reason, this IFR is streamlining the occupant protection plan requirement for a Section 405(b) Occupant Protection Grant. The IFR now directs States to reference the material already provided in the HSP (by page number), and does not include additional burdens or requirements.

ii. Click It or Ticket. (23 CFR 1300.21(d)(2))

The FAST Act continues the requirement that States participate in the *Click It or Ticket* national mobilization in order to qualify for an Occupant Protection Grant. States are required to describe Click it or Ticket activities in their HSP. The agency is amending this criterion only to direct the States to cite to this description of activities in their HSP, in lieu of including a separate submission as part of their application.

iii. Child Restraint Inspection Stations. (23 CFR 1300.21(d)(3))

The FAST Act continues the requirement that States have "an active network of child restraint inspection stations." The agency is amending this criterion to address considerations that the submission of comprehensive lists of inspection stations are burdensome and unnecessary. Today's IFR will require States to submit a table in their HSP documenting where the inspection stations are located and what populations they serve, including high risk groups. The State will also be required to certify that each location is staffed with certified technicians. The agency believes that this information will be sufficient for reviewers to evaluate whether there is an active network of stations.

iv. Child Passenger Safety Technicians. (23 CFR 1300.21(d)(4))

The FAST Act continues the requirement that States have a plan to recruit, train and maintain a sufficient number of child passenger safety technicians. The agency is amending this criterion to allow States to document this information in a table and submit it as part of the annual HSP, in lieu of providing a separate submission.

3. Additional Requirements for Lower Seat Belt Use Rate States

In addition to meeting the above requirements, States with a seat belt use rate below 90 percent must meet at least three of six criteria to qualify for grant funds. The agency is making changes to some of these criteria in today's IFR. Many of these changes address comments to streamline application materials. This IFR allows States to reference page numbers in the HSP in cases where such information has already been provided, in lieu of providing a separate submission.

i. Law-Based Criteria. (23 CFR 1300.21(e)(1) and (2))

The FAST Act continues two law-based criteria—primary seat belt use law and occupant protection laws—for Lower Seat Belt Use Rate States. The agency has reviewed comments related to legal requirements and exemptions under the primary belt and occupant protection law criteria. Commenters requested that NHTSA amend criteria to allow States more flexibility regarding minimum fines, additional exemptions and primary seat belt requirements. Legal criteria for primary seat belt and child restraint laws have been included in several of NHTSA's predecessor occupant protection grant programs. The agency adopted the specific requirements under the MAP–21 IFR with this consideration in mind. Given the maturity of the criteria under these programs and safety considerations in moving highway safety laws forward, the agency does not believe any changes are warranted.

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[5] The first year allowance under the MAP–21 IFR for providing an assurance related to the occupant protection plan no longer applies.

ii. Seat Belt Enforcement. (23 CFR 1300.21(e)(3))

This criterion requires a lower seat belt use rate State to "conduct sustained (on-going and periodic) seat belt enforcement at a defined level of participation during the year." The agency is amending this criterion to clarify that sustained enforcement must include a program of recurring seat belt and child restraint enforcement efforts throughout the year, and that it must be in addition to the Click it or Ticket mobilization. The agency is also amending the defined level of participation to require that it be based on problem identification in the State. States will be required to show that enforcement activity involves law enforcement covering areas where at least 70 percent of unrestrained fatalities occur.

States are already required to include in the HSP an evidence-based traffic safety enforcement program and planned high-visibility enforcement strategies to support national mobilizations. (§ 1300.11(d)(5) and (6)) States should include information related to seat belt enforcement in these sections of the HSP. In this discussion, States must describe efforts to integrate seat belt enforcement into routine traffic enforcement throughout the year and engage law enforcement agencies in at-risk locations with high numbers of unrestrained fatalities to increase seat belt use throughout the year. The use of a few scheduled efforts to promote seatbelt use will not be sufficient to meet the standard of sustained enforcement. The agency is requiring that States submit the seat belt enforcement application material as part of the HSP, in lieu of a separate submission.

iii. High Risk Population Countermeasure Programs. (23 CFR 1300.21(e)(4))

As noted earlier, States are already required to cover the occupant protection program area, including an evidence-based traffic safety enforcement program and planned high-visibility enforcement strategies to support national mobilizations, in the HSP. These sections of the HSP contain many of the same elements to address high risk populations, such as problem identification, countermeasure strategies and projects to meet performance targets. If a State wishes to qualify under this criterion, it should include information related to at least two at-risk populations in those sections of the HSP. The agency is requiring that States submit high risk population countermeasure program materials as part of the HSP, in lieu of a separate submission.

iv. Comprehensive Occupant Protection Program. (23 CFR 1300.21(e)(5))

A lower seat belt use rate State must implement a comprehensive occupant protection program in which the State has conducted a NHTSA-facilitated program assessment, developed a Statewide strategic plan, designated an occupant protection coordinator, and established a Statewide occupant protection task force. The MAP–21 IFR permitted an assessment reaching back to 2005. Today's IFR includes an amendment to require that States have a more recent assessment of their program (within five years prior to the application date). Today's IFR also makes updates to the program requirements to emphasize the importance of a comprehensive occupant protection program that is based on data and designed to achieve performance targets set by the States. The IFR also stresses the importance of the occupant protection coordinator's role in managing the entire Statewide program. With enhanced knowledge of the Statewide program and activities, a strategic approach to the development of the occupant protection program area of the annual HSP can be developed and executed.

4. Use of Grant Funds. (23 CFR 1300.21(f))

In addition to listing all the qualifying uses, the agency has reorganized this section under the IFR to list special rules that cover any other statutory requirement conditioning how grant funds are spent. Specifically, high belt use rate States are now permitted to use up to 100 percent of their occupant protection funds for any project or activity eligible for funding under section 402.

D. State Traffic Safety Information System Improvements Grants. (23 CFR 1300.22)

The FAST Act made no changes to the State Traffic Safety Information System Improvements Grants authorized under MAP–21. However, in this IFR, NHTSA streamlines the application process to reduce the burden on States.

In response to the MAP–21 IFR, commenters generally expressed concern that application requirements were burdensome. One commenter objected to the requirement that States submit different data for the applications for fiscal years 2013 and 2014, despite being allowed to use the same performance measures for both years. The agency does not address this comment as it is specific to those years and no longer applies. The agency addresses additional comments under the relevant headings below.

1. Traffic Records Coordinating Committee (TRCC) Requirement. (23 CFR 1300.22(b)(1))

The role of the TRCC in the State Traffic Safety Information System Improvements Grant program under this IFR remains the same as it was under the MAP–21 IFR, but the application requirements have been streamlined. NHTSA has removed many TRCC requirements, and is instead requiring a more refined set of information in order to determine that a State's TRCC can meet the goals of the statute.

Two commenters stated that the documentation requirements for the TRCC in the MAP–21 IFR, including meeting minutes, reports and guidance, were burdensome. While it remains good practice to keep and retain meeting minutes, reports and guidance, this IFR requires submission of only the dates of the TRCC meetings held in the 12 months prior to application. In order to meet this requirement in future grant years, States will have to schedule at least 3 meetings for the upcoming fiscal year, but NHTSA no longer requires States to provide proposed dates of the meetings.

One commenter proposed reducing the required number of TRCC meetings from three times a year to twice a year. However, the statute explicitly requires that the TRCC meet at least 3 times each year. The statute also requires that the State designate a TRCC coordinator.

In order to ensure that the TRCC has a diverse membership that is able to provide necessary expertise, the State must submit a list identifying at least one member (including the member's home organization), that represents each of the following core safety databases: (1) Crash, (2) citation or adjudication, (3) driver, (4) emergency medical services/injury surveillance system, (5) roadway, and (6) vehicle databases. The State's TRCC should have a broad multidisciplinary membership that includes, among others, owners, operators, collectors and users of traffic records and public health and injury control data systems; highway safety, highway infrastructure, law enforcement or adjudication officials; and public health, emergency medical services (EMS), injury control, driver licensing and motor carrier agencies and organizations. This diverse membership should serve to ensure that the TRCC has the authority and ability to access and review any of the State's highway safety data and traffic records systems.

2. Strategic Plan Requirement. (23 CFR 1300.22(b)(2))

This IFR requires a State to have a traffic records strategic plan that has been approved by the TRCC and describes specific quantifiable and measurable anticipated improvements in the State's core safety databases. More information on the requirements for performance measures is set forth in Section IV.D.3 below.

The Strategic Plan must identify all recommendations from the State's most recent traffic records system assessment and explain how each recommendation will be implemented or the reason a recommendation will not be addressed. One commenter stated that the requirement that a State explain why it will not address a particular recommendation is too burdensome and should be removed. However, NHTSA believes that the State's response to each recommendation, even those that it decides not to address, is necessary to ensure that the assessment recommendations serve their intended purpose of improving the State traffic safety information system. In order to emphasize the importance of coordinating the traffic records strategic plan with the State HSP, this IFR requires the State to identify the project in the HSP that will address each recommendation to be addressed in that fiscal year.

3. Quantifiable and Measurable Progress Requirement. (23 CFR 1300.22(b)(3))

Continuing the emphasis on performance measures and measurable progress, this IFR requires the State to provide a written description of the State's chosen performance measures along with supporting documentation. Performance measures must use the methodology set forth in the Model Performance Measures for State Traffic Records Systems (DOT HS 811 441) collaboratively developed by NHTSA and GHSA. Because NHTSA and GHSA may update this publication in future years, and intend the most recent version to be used, this IFR adds the language "as updated." The Model Minimum Uniform Crash Criteria (MMUCC), the Model Impaired Driving Records Information System (MIDRIS), the Model Inventory of Roadway Elements (MIRE) and the National Emergency Medical Services Information System (NEMSIS) model data sets continue to be central to States' efforts to improve their highway safety data and traffic records systems. For this reason, NHTSA strongly encourages States to achieve a higher level of compliance with a national model inventory in order to demonstrate measurable progress.

To satisfy this quantitative progress requirement, the State must submit supporting documentation demonstrating that quantitative improvement was achieved within the preceding 12 months. The documentation must cover a contiguous 12 month performance period preceding the date of application starting no earlier than April of the preceding calendar year as well as a comparative 12 month baseline period. In the fiscal year 2017 application, for example, a State would submit documentation covering a performance period starting no earlier than April 1, 2015, and extending through March 31, 2016, and a baseline period starting no earlier than April 1, 2014, and extending through March 31, 2015. Acceptable supporting documentation will vary depending on the performance measure and database used, but may include analysis spreadsheets, system screen shots of the related query and aggregate results.

States are strongly encouraged to submit one or more voluntary interim progress reports to their Regional office documenting performance measures and supporting data that demonstrate quantitative progress in relation to one or more of the six significant data program attributes. NHTSA recommends submission of the interim progress reports prior to the application due date to provide time for the agency to interact with the State to obtain any additional information needed to verify the State's quantifiable, measurable progress. However, Regional office review of an interim progress report does not constitute pre-approval of the performance measure for the grant application.

4. Requirement To Conduct or Update a Traffic Records System Assessment. (23 CFR 1300.22(b)(4))

This IFR requires that a State's certification be based on an assessment that complies with the procedures and methodologies outlined in NHTSA's Traffic Records Highway Safety Program Advisory. As in the past, NHTSA will continue to conduct State assessments that meet the requirements of this section without charge, subject to the availability of funding.

5. Use of Grant Funds. (23 CFR 1300.22(d))

States may use grant funds awarded under this subsection for making data program improvements to their core highway safety databases (including crash, citation and adjudication, driver, EMS or injury surveillance system, roadway and vehicle databases) related to quantifiable, measurable progress in any of the significant data program attributes of accuracy, completeness, timeliness, uniformity, accessibility or integration. This IFR makes no change to the allowable use of funds under this grant program.

E. Impaired Driving Countermeasures Grants. (23 CFR 1300.23)

The FAST Act did not make substantive changes to the basic impaired driving countermeasures grants authorized under MAP–21, but added flexibility to the separate grant program for States with mandatory ignition interlock laws and created a new grant for States with 24–7 sobriety programs.

1. Determination of Range for Impaired Driving Countermeasures Grants

The FAST Act made no changes to the classification of low-, mid- and high-range States and to the use of average impaired driving fatality rates to determine what requirements a State must meet in order to receive a grant. This IFR retains those requirements in the MAP–21 IFR. To provide ample time to meet any application requirements, the agency will make the classification information available to the States in January each year.

2. Low-Range States. (23 CFR 1300.23(d))

States that have an average impaired driving fatality rate of 0.30 or lower are considered low-range States. Under the MAP–21 IFR, all States, including low-range States, were required to submit certain assurances indicating their intent to meet statutory requirements related to qualifying uses of funds and maintenance of effort requirements. This IFR makes no changes to that requirement.

3. Mid-Range States. (23 CFR 1300.23(e))

States that have an average impaired driving fatality rate that is higher than 0.30 and lower than 0.60 are considered mid-range States. The statute specifies that States qualifying as mid-range States are required to submit a Statewide impaired driving plan that addresses the problem of impaired driving. The submitted plan must have been developed by a Statewide impaired driving task force within three years prior to the application due date.[6]

In an effort to streamline the application process developed under the MAP–21 IFR, mid-range States will be required to submit only a single document (in addition to any required certifications and assurances)—a Statewide impaired driving plan—to demonstrate compliance with the statute. In the past, a wide-range of formats and efforts were used by States to meet the plan requirements. In this IFR, the agency is requiring the use of a uniform format. Compliance will be determined based on the review of three specific sections.

The first section requires the State to provide a narrative statement that explains the authority of the task force to operate and describes the process used by the task force to develop and approve the plan. The State must also identify the date of approval of the plan in this section. This information will allow the agency to determine compliance with the requirement that the impaired driving plan be developed by a task force within three years prior to the application due date.

The second section continues the MAP–21 IFR requirement for a list of task force members. This IFR clarifies that the list must include the names, titles and organizations of all task force members. From that information, the agency must be able to determine that the task force includes key stakeholders from the State highway safety agency, State law enforcement groups, and the State's criminal justice system, covering areas such as prosecution, adjudication, and probation. The State may include other individuals on the task force, as determined appropriate, from areas such as 24–7 sobriety programs, driver licensing, data and traffic records, treatment and rehabilitation, public health, communication, alcohol beverage control, and ignition interlock programs. The State must include a variety of individuals from different offices that bring different perspectives and experiences to the task force. Such an approach ensures that the required plan will be a comprehensive treatment of impaired driving issues in a State. For guidance on the development of these types of task forces, we encourage States to review the NHTSA report entitled, "A Guide for State-wide Impaired Driving Task Forces."[7]

The final section requires the State to provide its strategic plan for preventing and reducing impaired driving behavior. The agency is requiring that an impaired driving plan be organized in accordance with Highway Safety Program Guideline No. 8—Impaired Driving ("the Guideline")[8] and cover certain identified areas. The identified areas include prevention, criminal justice system, communications programs, alcohol and other drug misuse, and program evaluation and data. Each area is defined within the Guideline. States are free to cover other areas in their plans provided the areas meet one of the qualifying uses of funds (as identified in the FAST Act), but the plans must cover the identified areas. Plans that do not cover these areas are not eligible to receive a grant.

While NHTSA has identified the areas that must be considered, the agency has not defined a level of effort that must be exerted by the State in the development of the strategic plan (*e.g.,* how many task force meetings should be held; how many hours should be spent considering these issues). The agency expects that States will spend the time necessary to consider and address these important issues, in view of the substantial amount of grant funds involved. In our view, an optimal process involves a task force of 10 to 15 members from different impaired driving disciplines, meeting on a regular basis (at least initially), to review and apply the principles of the Guideline to the State's impaired driving issues and to determine which aspects of the Guideline deserve special focus. The result of that process should be a comprehensive strategic plan that forms the State's basis to address impaired driving issues.

To receive a grant in subsequent years, once a plan has been approved, a mid-range State is required to submit the certifications and assurances covering qualifying uses of funds, maintenance of effort requirements, and use of previously submitted plan (as applicable). This assurance about the previously submitted plan does not apply to a Statewide plan that has been revised. In that case, the State is required to submit the revised Statewide plan for review to determine compliance with the statute and implementing regulation.

4. High-Range States. (23 CFR 1300.23(f))

States that have an average impaired driving fatality rate that is 0.60 or higher are considered high-range States. High-range States are required to have conducted an assessment of the State's impaired driving program within the three years prior to the application due date.[9] This IFR continues to define an assessment as a NHTSA-facilitated process.

Based on this assessment, a high-range State is required to convene an impaired driving task force to develop a Statewide impaired driving plan (both the task force and plan requirements are described in the preceding section under mid-range States). In addition to meeting the requirements associated with developing a Statewide impaired driving plan, the plan also must include a separate section that expressly addresses the recommendations from the required assessment. The assessment review should be an obvious section of a high-range plan. A high-range State must address each of the recommendations in the assessment and explain how it intends to carry out each recommendation (or explain why it cannot carry out a recommendation).

The plan also must include a section that provides a detailed project list for spending grant funds on impaired driving activities, which must include high-visibility enforcement efforts as one of the projects (required by statute). The section also must include a description of how the spending supports the State's impaired driving program and achievement of its performance targets.

To receive a grant in subsequent years, the State's impaired driving task force must update the Statewide plan and submit the updated plan for NHTSA's review and comment. The statutory requirements also include updating the assessment review and the spending plan and submitting those for approval.

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[6] The first year allowance under the MAP–21 IFR for providing an assurance that the State will convene a statewide impaired driving task force to develop a statewide impaired driving plan no longer applies. Because the FAST Act continues the impaired driving countermeasures grant without substantive change, the agency interprets the first year of the grant as the first year that the impaired driving countermeasure grants were awarded, *i.e.,* fiscal year 2013. Accordingly, States no longer have the option to provide assurances that the State will convene a statewide impaired driving task force to develop a statewide impaired driving plan.

[7] The guide is *Available at http://www.nhtsa.gov/Driving+Safety/Impaired+Driving/A+Guide+for+Local+Impaired-Driving+Task+Forces.*

[8] The guideline is *Available at http://www.nhtsa.gov/nhtsa/whatsup/tea21/tea21programs/pages/ImpairedDriving.htm.*

[9] The first year allowance under the MAP–21 IFR for providing an assurance that the State will conduct an assessment of the State's impaired driving program and convene a statewide impaired driving task force to develop a statewide impaired driving plan no longer applies. Because the FAST Act continues the impaired driving countermeasures grant without substantive change, the agency interprets the first year of the grant as the first year that the impaired driving countermeasure grants were awarded, *i.e.,* fiscal year 2013. Accordingly, States no longer have the option to provide assurances that the State will conduct an assessment of the State's impaired driving program and convene a statewide impaired driving task force to develop a statewide impaired driving plan.

5. Alcohol-Ignition Interlock Law Grants. (23 CFR 1300.23(g))

The FAST Act continues a separate grant program for States that adopt and enforce mandatory alcohol-ignition interlock laws covering all individuals convicted of a DUI offense, but adds flexibility for States to qualify for a grant. The FAST Act amends the program to include exceptions that allow an individual to drive a vehicle in certain situations without an interlock. Specifically, a State's law may include exceptions from mandatory interlock use in the following three situations: (1) An individual is required to drive an employer's motor vehicle in the course and scope of employment, provided the business entity that owns the vehicle is not owned or controlled by the individual ("employment exception"); (2) an individual is certified in writing by a physician as being unable to provide a deep lung breath sample for analysis by an ignition interlock device ("medical exception"); or (3) a State-certified ignition interlock provider is not available within 100 miles of the individual's residence ("locality exception"). In response to the statutory change, the agency has included these exceptions in the IFR.

In this IFR, the agency increases the minimum period that a State law must authorize an offender to use an ignition interlock from 30 days to six months. Under the MAP–21 IFR, the agency required only 30 days as the minimum period because no exceptions were permitted from the mandatory requirement to use an interlock. With the addition of the exceptions under the FAST Act, States are afforded significantly more flexibility in their interlock programs, and the justification for allowing a shorter period of interlock use no longer exists. This is also consistent with comments the agency received under the MAP–21 IFR, urging the agency to adopt a longer restriction. These comments asserted that several States require interlock use for offenders for six months or more, and that the agency should adopt a period consistent with these existing State laws. The laws identified by the commenters were examples that contained exceptions, and would not have qualified under the MAP–21 IFR for that reason. We recognize that several States amended their laws, removing exceptions in order to comply with the grant requirements under the MAP–21 IFR. In all cases, these amended laws required interlock use for at least six months, despite the 30-day requirement in the MAP–21 IFR. With the addition of permissible exceptions under the FAST Act, we do not believe that the six-month duration requirement is an onerous one.

Under the MAP–21 IFR, the agency received several other comments regarding these grants, including a criticism of the program under the assumption that taxpayers typically pay for interlock programs. In fact, States often defray their own program costs by making the offender, and not taxpayers, responsible for the costs associated with the installation and maintenance of an interlock. We believe that interlock programs should be part of every State's strategy for eliminating impaired driving. Strong evidence exists supporting the effectiveness of interlock programs for reducing drunk driving recidivism while the technology is installed on an individual's vehicle.[10]

Among several comments that were supportive of the grant program, one commenter requested that the agency add criteria to the interlock requirements beyond those stated in the statute. Since the statute directs the basis for qualification, we decline to include other requirements. We agree, however, with the comment that States should consider agency-supported studies and materials that identify and explain best practices for improving ignition interlock programs.[11]

In order to qualify, a State must submit legal citations to its mandatory ignition interlock laws each year with its application. In accordance with the statute, not more than 12 percent of the total amount available for impaired driving countermeasures grants may be used to fund these grants. The agency plans to continue to calculate the award amounts for this program in the same manner as it did under the MAP–21 IFR. This IFR makes no change to this provision.

At present, few States qualify for these grants. To avoid the circumstance where a relatively few States might receive large grant amounts, the agency may choose to reduce the percent of total funding made available for these grants, consistent with the flexibility afforded by the statute, which specifies that "not more than 12 percent" may be made available for these grants.

6. 24–7 Sobriety Program Grants. (23 CFR 1300.23(h))

The FAST Act includes a separate grant program for States that meet requirements associated with having a 24–7 sobriety program. NHTSA recognizes the value of impaired driving interventions such as 24–7 sobriety programs. The agency acknowledges that the effectiveness of such programs is likely associated with their alignment with traditional principles of deterrence: *swift and certain.* 24–7 sobriety programs typically approach this deterrence model by focusing on the most high-risk offenders, requiring abstinence from alcohol or illegal drugs, testing compliance multiple times per day, and swiftly delivering defined consequences for noncompliance.

Under this provision, grants are provided to States that meet two separate requirements, and this IFR implements these requirements. The first requirement mandates that a State enact and enforce a law that requires all individuals convicted of driving under the influence of alcohol or of driving while intoxicated to receive a restriction on driving privileges. Under this first requirement, the license restriction must apply for at least a 30-day period. The IFR adds a definition of the term "restriction on driving privileges" to clarify the type of restrictions that comply and to make clear that States have broad flexibility in meeting the requirement. The definition covers any type of State-imposed limitation and provides examples of the most common restrictions, including license revocations or suspensions, location restrictions, alcohol-ignition interlock device requirements or alcohol use prohibitions.

The second requirement mandates that a State provide a 24–7 sobriety program. Under the statute, a 24–7 sobriety program means a State law or program that authorizes a State court or an agency with jurisdiction to require an individual who has committed a DUI offense to abstain totally from alcohol or drugs for a period of time and be subject to testing for alcohol or drugs at least twice per day at a testing location, by continuous transdermal monitoring device, or by an alternative method approved by NHTSA. In order to comply, the State must be able to point to a law or program that meets this requirement. Also, the law or program must have Statewide applicability. Although the law or program need not require that every DUI offender be subject to a 24–7 sobriety program, it must be authorized to apply on a Statewide basis. Consequently, a pilot program that may be in use in a small portion of a State or a program that is based solely at a local government level (*e.g.*, county-based) would not be eligible for these funds. However, States that qualify for a general impaired driving countermeasures grant may use those funds to support 24–7 sobriety pilot programs or county programs.

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[10] Raub, R.A., Lucke, R.E., & Wark, R.I., *Breath Alcohol Ignition Interlock Devices: Controlling the Recidivist.* Traffic Injury Prevention 4, p. 199–205 (2013).

[11] Mayer, R., *Ignition Interlocks–What You Need to Know: A Toolkit for Program Administrators, Policymakers, and Stakeholders, 2nd Ed.,* DOT–HS–811–883 (Washington, DC: National Highway Traffic Safety Administration, 2014). *Available at http://www.nhtsa.gov/staticfiles/nti/pdf/IgnitionInterlocks_811883.pdf; Model Guideline for State Ignition Interlock Programs,* DOT–HS–811–859 (Washington, DC: National Highway Traffic Safety Administration, 2013). Available at *http://www.nhtsa.gov/staticfiles/nti/pdf/811859.pdf.*

In line with the statutory definition, a compliant law or program must use certain types of testing to regularly monitor DUI offenders under the 24–7 sobriety program. Under the MAP–21 IFR, the agency received comments suggesting additional testing methods and minimum performance requirements for testing devices. However, we do not believe that approach is necessary. The statute defines a testing process that States must apply to offenders in a 24–7 program. Specifically, in accordance with the definition, an offender must be subject to testing for alcohol or drugs at least twice per day at a testing location, or by continuous monitoring via electronic monitoring device, or by an alternative method approved by NHTSA. If the State uses these types of identified test methods, it will be eligible to receive a grant. Although the agency does not identify additional testing methods or set specific performance requirements in this IFR, it reserves the right to do so, consistent with the statutory allowance for alternative methods to be approved. Any additional testing method that might be approved must allow the program to meet the general deterrence model discussed above, ensuring a swift and certain response from the State for program violators. For example, a method used for alcohol testing should be conducted at least twice per day and a method used for drug testing should be conducted on at least a scheduled basis. In addition, the periods for testing must be clear in the law or program cited, so that a State has the ability to take swift action. For these requirements, covering the types and periods of testing that should be used in 24–7 sobriety programs, we are particularly interested in public comments.

Under the MAP–21 IFR, the agency received several comments regarding the inclusion of 24–7 sobriety programs as a qualifying use of grant funds. The prior IFR simply added the statutory definition without intended change.[12] States that met this definition were allowed to use grant funds for a 24–7 sobriety program. One commenter indicated that the statute contained a drafting mistake and that participating offenders under a 24–7 sobriety program were required to be tested for both drugs *and* alcohol to meet the definition, instead of for drugs *or* alcohol as stated in MAP–21 (and included without change in the FAST Act). A separate commenter disagreed with this position. In reviewing this issue, we find no evidence to suggest that Congress intended something different in the statutory definition provided. Since the purpose of the section covers grants to States for programs designed to reduce driving under the influence of alcohol, drugs, or a the combination of alcohol and drugs, we believe that the definition for testing under 24–7 sobriety programs also applies to any one of these circumstances. Consistent with the statutory language, States have the flexibility to test offenders for alcohol, drugs or a combination of both to meet program requirements.

In order to qualify, a State must submit the required legal citations or program information by the application deadline. A State wishing to receive a grant is required to submit legal citations to its law authorizing a restriction on driving privileges for all DUI offenders for at least 30 days. The State must also submit legal citations to its law or a copy of its program information that authorizes a Statewide 24–7 sobriety program.

In accordance with the statute, not more than 3 percent of the total amount available under this section may be used to fund these grants. The agency plans to calculate award amounts in the same manner as for Alcohol-Ignition Interlock Law Grants. Amounts not used for these grants will be used for grants to low-, mid- and high-range States. The agency believes it is possible that few States will initially qualify for a grant. Therefore, as with Alcohol-Ignition Interlock Law Grants, the agency may choose to reduce the percent of total funding made available for these grants, consistent with the flexibility afforded by the statute, which specifies that "not more than 3 percent" may be made available for these grants.

7. Use of Grant Funds. (23 CFR 1300.23(i))

States may use grant funds for any of the uses identified in the FAST Act. In this IFR, the agency includes definitions for some of the uses. In all cases, the definitions are consistent with those provided for in the FAST Act or were developed under the MAP–21 IFR. The agency received comments related to a State's ability to fund certain projects using grant funds provided for impaired driving countermeasures. These comments related to the use of funds for specific impaired driving programs, arguing for specific approaches over others and for more funds to be spent on drug impaired driving programs. In general, we agree that States should use several different types of programs as part of a comprehensive approach to addressing impaired driving. However, the programs for which grant funds may be used are limited to those identified by Congress in the statute. We choose not to prioritize one type of authorized program over another, and qualifying States may use the funds on any of the identified programs. Unless the program is specifically identified to alcohol enforcement, grant funds may be used for programs identified in statute that address the problem of drug-impaired driving. We encourage States to have programs that focus on this growing problem.

In addition to listing all the qualifying uses, the agency has reorganized this section under today's IFR to list special rules that cover any other statutory requirements conditioning how grant funds are spent. For low-range States, grant funds may be used for any of the projects identified in the statute and for those designed to reduce impaired driving based on problem identification. In addition, low-range States may use up to 50 percent of grant funds for any eligible project or activity under Section 402.

For mid-range States, grant funds may be used for any of the projects identified in the statute and for projects designed to reduce impaired driving based on problem identification, provided the State has received advance approval from NHTSA for such projects based on problem identification. The agency received one comment questioning the approval requirement under the MAP–21 IFR. However, that requirement is a statutory one. Although the requirement did not appear in SAFETEA–LU, it was added by Congress in MAP–21 and continued under the FAST Act. We agree with the commenter that programs based on problem identification included in the application of a mid-range State that receives approval do not need further review. However, if the State creates a separate spending plan in its HSP based on its Statewide impaired driving plan and later revises that plan, it will be required to receive approval for that revision, consistent with the statutory requirement.

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[12] Several commenters noted the typographical error in the IFR. We have corrected the definition here.

High-range States may use grant funds for the projects identified above only after submission of a Statewide impaired driving plan, and review and approval of the plan by NHTSA. States receiving Alcohol-Ignition Interlock Law Grants or 24–7 Sobriety Program Grants may use those grant funds for any of the projects identified and for any eligible project or activity under Section 402.

F. Distracted Driving Grants. (23 CFR 1300.24)

MAP–21 created a new program authorizing incentive grants to States that enact and enforce laws prohibiting distracted driving. Few States qualified for a Distracted Driving Grant under the statutory requirements of MAP–21. The FAST Act amended the qualification criteria for a Distracted Driving Grant, revising the requirements for a Comprehensive Distracted Driving Grant and providing for Special Distracted Driving Grants for States that do not qualify for a Comprehensive Distracted Driving Grant.

1. Qualification Criteria for a Comprehensive Distracted Driving Grant. (23 CFR 1300.24(c))

The basis for a Comprehensive Distracted Driving Grant is a requirement that the State tests for distracted driving issues on the driver's license examination and that the State have a statute that complies with the criteria set forth in 23 U.S.C. 405(e), as amended by the FAST Act. Specifically, the State must have a conforming law that prohibits texting while driving and youth cell phone use while driving.

i. Testing Distracted Driving Issues. (23 CFR 1300.24(c)(1))

To qualify for a grant under MAP–21, the State statute had to require distracted driving issues to be tested as part of the State driver's license examination. Few States met this requirement. In response to the MAP–21 IFR, one commenter disagreed with this requirement and believed that the State should be able to certify that State driver licensing examinations tested for distracted driving questions. The agency need not address this comment because it is no longer applicable. The FAST Act amended this requirement to allow a State to qualify for a grant if it does, in fact, test for distracted driving issues on the driver's license examination, without the need for a statutory mandate. To demonstrate that it tests for distracted driving issues under today's IFR, the State must submit sample distracted driving questions from its driver's license examination as part of its application.

ii. Definition of Driving. (23 CFR 1300.24(b)

The FAST Act amended the definition of "driving" to strike the words "including operation while temporarily stationary because of traffic, a traffic light or stop sign, or otherwise". As amended, "driving" means "operating a motor vehicle on a public road; and does not include operating a motor vehicle when the vehicle has pulled over to the side of, or off, an active roadway and has stopped in a location where it can safely remain stationary." The IFR adopts this definition without change.

iii. Texting Prohibition. (23 CFR 1300.24(c)(2)(i))

The FAST Act retained much of the MAP–21 requirements related to the texting prohibition, including the types of behaviors prohibited, primary enforcement, and a minimum fine. Those provisions are retained in this section. The FAST Act removed the requirement for increased fines for repeat violations and added the requirement that the State statute may not include an exemption that specifically allows a driver to text through a personal wireless communications device while stopped in traffic. Those FAST Act amendments are adopted in this section without change.

iv. Youth Cell Phone Use Prohibition. (23 CFR 1300.24(c)(2)(ii))

The FAST Act retained much of the MAP–21 requirements related to the prohibition on young drivers using a personal wireless communications device while driving, including the types of behaviors prohibited, and the requirements for primary enforcement and a minimum fine. Those provisions are retained in this section.

MAP–21 required the State statute to prohibit a driver who is younger than 18 years of age from using a personal wireless communications device while driving. The FAST Act amended this provision to allow a State to qualify for a grant if the State statute prohibited a driver under 18 years of age or a driver with a learner's permit or intermediate license from using a personal wireless communications device while driving. As with the texting prohibition, the FAST Act removed the requirement for increased fines for repeat violations and added the requirement that the State statute not include an exemption that specifically allows a driver to text through a personal wireless communications device while stopped in traffic. Those FAST Act amendments are adopted in this section without change.

2. Use of Comprehensive Distracted Driving Grant Funds. (23 CFR 1300.24(d))

MAP–21 provided that each State that receives a Section 405(e) grant must use at least 50 percent of the grant funds for specific distracted driving related activities and up to 50 percent for any eligible project or activity under Section 402. In addition to listing all the qualifying uses, the agency has reorganized this section under today's IFR to list special rules that cover any other statutory requirement conditioning how grant funds are spent.

The FAST Act allows a State to use up to 75 percent of Section 405(e) funds for any eligible project or activity under Section 402 if the State has conformed its distracted driving data to the most recent Model Minimum Uniform Crash Criteria (MMUCC), a voluntary guideline designed to help States determine what crash data to collect on their police accident reports (PARs) and what data to code and carry in their crash databases. In "Mapping to MMUCC: A process for comparing police crash reports and state crash databases to the Model Minimum Uniform Crash Criteria" (DOT HS 812 184), NHTSA and the Governors Highway Safety Association developed a methodology for mapping the data collected on PARs and the data entered and maintained on crash databases to the data elements and attributes in the MMUCC Guideline. This methodology will be the basis for determining whether a State has conformed its distracted driving data to the most recent MMUCC. Because NHTSA may update this publication in future years, and intends the most recent version to be used, this IFR adds the language "as updated." If a State qualifies for a Comprehensive Distracted Driving Grant, the State must demonstrate that its distracted driving data collection conforms with MMUCC, *i.e.*, is 100 percent mappable. NHTSA intends to develop an excel spreadsheet that States may use to demonstrate that their distracted driving data collection conforms with MMUCC. States must submit the executed spreadsheet showing 100 percent mappable distracted driving data collection within 30 days after award notification.

3. Special Distracted Driving Grants. (23 CFR 1300.24(e)(3))

The FAST Act authorized additional distracted driving grants for those States that do not qualify for a Comprehensive Distracted Driving Grant for fiscal years 2017 and 2018. In this IFR, the agency refers to these additional distracted driving grants as "Special Distracted Driving Grants." For fiscal year 2017, a State qualifies for a Special Distracted Driving Grant if it has a "basic text messaging statute" that is enforced on a primary or secondary basis and the State does not qualify for a Comprehensive Distracted Driving Grant. The statute uses the term, "basic text messaging statute," but does not define it. The agency believes the intent was to distinguish "basic text messaging" from "texting" as defined by MAP–21 (and unchanged by the FAST Act). For this reason, the agency is defining "basic text messaging statute" as a statute that prohibits a driver from manually inputting or reading from an electronic device while driving for the purpose of written communication.

The requirements for a Special Distracted Driving Grant become stricter in fiscal year 2018. In addition to the requirement for a basic text messaging statute, the State must also enforce the law on a primary basis, impose a fine for a violation of the law, and prohibit drivers under the age of 18 from using a personal wireless communications device while driving. As is the case for fiscal year 2017, the State must also not qualify for a Comprehensive Distracted Driving Grant. The IFR adopts these statutory provisions without change.

The FAST Act specifies allowable uses for grant funds—activities related to the enforcement of distracted driving laws, including public information and awareness. In addition, States may use up to 15 percent of the grant funds in fiscal year 2017 and 25 percent in fiscal year 2018 for any eligible project or activity under Section 402. This IFR makes no change to the allowable use of funds under this grant program.

G. Motorcyclist Safety Grants. (23 CFR 1300.25)

In 2005, Congress enacted the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), Public Law 109–59, which authorized the Motorcyclist Safety Grants under section 2010. MAP–21 adopted the SAFETEA–LU Motorcyclist Safety Grants largely unchanged. (23 U.S.C. 405(f)) The Fast Act amended the Motorcyclist Safety grants to address the allocation of funds, provide flexibility in the use of funds, and add a requirement that the Secretary update and provide to the States model Share The Road language. The FAST Act did not amend the qualifications for the Motorcyclist Safety grants, which remain the same as under MAP–21. States qualify for a grant by meeting two of the following six grant criteria: Motorcycle Rider Training Courses; Motorcyclists Awareness Program; Reduction of Fatalities and Crashes Involving Motorcycles; Impaired Driving Program; Reduction of Fatalities and Accidents Involving Impaired Motorcyclists; and Use of Fees Collected from Motorcyclists for Motorcycle Programs. (23 U.S.C. 405(f)(3)). To streamline the application process for section 405 grants, this IFR amends the six grant criteria to require that materials demonstrating compliance for each criterion be submitted with the State's HSP.

1. General Revision to the Six Motorcyclist Safety Grant Criteria

Prior to today's IFR, the Motorcyclist Safety Grant regulation first identified the elements to satisfy a specific criterion and then the elements to demonstrate compliance. In general, States provided application information and data as attachments to their HSP. This approach required States to submit a significant number of documents and data, and often required the States and the agency to engage in additional efforts to clarify whether a State demonstrated compliance. Today's IFR streamlines the regulatory text for each of the six Motorcyclist Safety Grant criteria and reduces State application burdens for a Motorcyclist Safety Grant. This IFR eliminates the requirement for separate submissions to satisfy each criterion, as long as the relevant required information is included in the HSP. This approach is intended to shift the focus to ensure that each State bases its motorcycle safety programs on data-driven problem identification and countermeasures to meet the criteria for a Motorcycle Safety Grant.

2. Motorcycle Rider Training Course. (23 CFR 1300.25(e))

To qualify for a grant under this criterion, section 405(f)(3)(A) requires a State to have "an effective motorcycle rider training course that is offered throughout the State, provides a formal program of instruction in accident avoidance and other safety-oriented operational skills to motorcyclists and that may include innovative training opportunities to meet unique regional needs." Based upon many years of experience in administering the Motorcycle Safety Grants, the agency is reevaluating the requirements to demonstrate compliance with this criterion. At this time, every State has adopted an established motorcycle rider training program that is a result of a systematic and standardized approach to teach crash avoidance and the safe operation of motorcycles. Therefore, States will no longer be required to submit multiple documents to justify and support the selected training curriculum. Instead, States must use one of the following four identified training programs: The Motorcycle Safety Foundation (MSF) Basic Rider Course, TEAM OREGON Basic Rider Training (TEAM OREGON), Idaho STAR Basic I (Idaho STAR), or the California Motorcyclist Safety Program Motorcyclist Training Course (California). These curricula are well-established, formal instruction programs in common use across the United States. Each of them has been formalized and standardized through scientific research and field testing. And, each offers instruction in crash avoidance, motorcycle operation and other safety-oriented skills that require in-class instruction and on-the-motorcycle training, provide certified trainers, and have institutionalized quality control measures. With the requirement to use one of these well-established training courses, the need for documentation establishing the merits of the training course no longer exists.

In lieu of the previously required documentation submission, today's IFR instead requires a certification from the Governor's Representative for Highway Safety identifying the head of the designated State authority having jurisdiction over motorcyclist safety issues and that head of the designated State authority having jurisdiction over motorcyclist safety issues has approved and the State has adopted and uses one of these four established and standardized introductory motorcycle rider curricula. Alternatively, in order to allow development of training that meets unique regional needs, the IFR permits the Governor's Representative for Highway Safety to certify that head of the designated State authority has approved and the State has adopted and uses a curriculum that meets NHTSA's Model National Standards for Entry-Level Motorcycle Rider Training. Such curriculum must have been approved by NHTSA as meeting NHTSA's Model National Standards for Entry-Level Motorcycle Rider Training before the application.

The statute requires the State motorcycle rider training program to be Statewide. (23 U.S.C. 405(f)(e)) To meet this requirement, today's IFR requires the State to provide a list of the counties or political subdivisions in the State where motorcycle rider training courses will be conducted in the 12 months of the fiscal year of the grant and the corresponding number of registered motorcycles in each county or political subdivision, according to official State motor vehicle records, provided that the State offers at least one motorcycle rider training course in counties or political subdivisions that collectively account for a majority of the State's registered motorcycles.

Finally, to meet this criterion, the State must submit the official State document identifying the designated State authority having jurisdiction over motorcyclist safety issues, as was required under the MAP–21 IFR.

3. Motorcycle Awareness Program, (23 CFR 1300.25(e))

To qualify under this criterion, a State must have "an effective statewide program to enhance motorist awareness of the presence of motorcyclists on or near roadways and safe driving practices that avoid injuries to motorcyclists." (23 U.S.C. 405(f)(3)(B)) The statute defines Motorcycle Awareness Program as "an informational or public awareness program designed to enhance motorcyclist awareness that is developed by or in coordination with the designated State authority having jurisdiction over motorcyclist safety issues, which may include the State motorcycle safety administrator or a motorcycle advisory council appointed by the governor of the State." (23. U.S.C. 405(f)(5)(B)) Motorcycle Awareness is also defined by the statute to mean "individual or collective awareness of (i) the presence of motorcycles on or near roadways; and (ii) safe driving practices that avoid injury to motorcyclists." (23 U.S.C. 405(f)(5)(C)) The FAST Act did not amend the statutory criterion or these definitions.

The agency is streamlining the submission requirements under this criterion. Today's IFR continues to require the State's Motorcycle Awareness Program to be developed by, or in coordination with, the designated State authority having jurisdiction over motorcyclist safety issues. It requires a certification from the Governor's Representative for Highway Safety identifying the head of the designated State authority having jurisdiction over motorcyclist safety issues and that the State's motorcyclist awareness program was developed by or in coordination with the designated State authority having jurisdiction over motorcyclist safety issues. The IFR no longer requires submission of the detailed strategic communications plan. One commenter under the MAP–21 IFR stated that the requirement for a strategic communications plan did not reflect the practical realities of the program (especially considering the small amount of grant funds), and should be scaled back. The agency agrees, and we have substituted a different approach.

Based upon experience, the agency believes that State motorcycle awareness programs have not used available State crash data to its fullest extent to target specific motorcycle problem areas. Rather, the awareness programs have been based upon generalized use of crash data that has resulted in messages and slogans that bear little relation to the causes of motorcycle crashes. Therefore, to demonstrate that a State is implementing a data-driven State awareness program that targets problem areas, this IFR requires the State to submit in its HSP a performance measure and performance targets with a list of countermeasure strategies and projects that will be deployed to meet these targets. True data-driven problem identification and prioritization will take into account crash location and causation in the development of specific countermeasures.

In the problem identification process, the State must use crash data queries to determine, at a minimum, the jurisdictions with the highest to lowest number of multi-vehicle crashes involving motorcycles. The State must select countermeasure strategies and projects implementing the motorist awareness activities based on the geographic location of crashes. For example, if a State plans to procure a digital media buy aimed at educating motorists about speed variability and blind spots, it should specify in which counties the digital media buy will take place to effectuate the statutory requirement that the motorcycle awareness program be Statewide. Creating awareness messages infrequently during the year or in only a few geographic locations will not be sufficient to meet the requirement for a Statewide awareness program. Today's IFR provides the State flexibility to address specific motorcycle awareness issues while focusing the State's resources to target motorist behaviors or geographic area based upon problem identification.

4. Impaired Driving Program. (23 CFR 1300.25(h))

Previously, a State had to submit separate data and specific countermeasures to reduce impaired motorcycle operation. This requirement was separate from the performance measures, targets and countermeasure strategies required in the HSP under § 1300.11. Today's IFR directs States to use the HSP process of problem identification, performance measures and targets, and countermeasure strategies to apply under this criterion. A State must provide performance measures and corresponding performance targets developed to reduce impaired motorcycle operation in its HSP in accordance with § 1300.11(c). In addition, the State must list the countermeasure strategies and projects the State plans to implement to achieve its performance targets in the HSP.

5. Criteria With No Substantive Amendments

i. Reduction of Fatalities and Crashes Involving Motorcycles. (23 CFR 1300.25(g); Reduction in Fatalities and Accidents Involving Impaired Motorcyclists. (23 CFR 1300.25(i))

Today's action makes no structural amendments to two criteria—reduction of fatalities and crashes involving motorcycles and reduction in fatalities and accidents involving impaired motorcyclists. However, to provide additional flexibility, the IFR amends the age of the data that States must use. Specifically, the IFR allows States to use FARS data from up to three calendar years before the application date. The agency will make this information available to the States in January each year.

ii. Use of Fees Collected From Motorcyclists for Motorcycle Programs. (23 CFR 1300.25(j))

Today's action does not make any changes to this criterion. However, the agency is explaining its requirements in further detail to better assist States in demonstrating compliance and to address some continuing confusion.

To be eligible for a Motorcyclist Safety Grant under this criterion, the Federal statute requires that "[a]ll fees collected by the State from motorcyclists for the purposes of funding motorcycle training and safety programs will be used for motorcycle training and safety purposes." (23 U.S.C. 405(f)(3)(F)) This requires a State to take two actions with respect to fees for motorcyclist training: (1) Collect and deposit all the fees from motorcyclists; and (2) distribute all fees collected, without diversion, for training and safety programs. Whether a State applies as a "Law State" or a "Data State" under this criterion, NHTSA requires sufficient documentation to show that the State's process does not permit any diversion.

In response to the MAP–21 IFR, one commenter raised concerns that some States might seek to transfer the fees collected for motorcycle training to other uses, thereby jeopardizing the State's ability to qualify under the Use of Fees criterion. The agency shares these concerns, and they form the basis for the requirements described below.

To confirm that a Law State has not diverted motorcyclist fees to another program, the agency requires the State to provide the citation to the law or laws collecting all fees requiring that the fees be used for motorcyclist training or safety *and* to the law appropriating the fees from the State treasury to fund the authorized program. This is so because it is possible for a State to have a law specifying that motorcycle fees are to be set aside only for training, yet divert some of these funds by subsequent appropriation. In fact, the agency has encountered this circumstance in an application under this criterion.

Under the typical legislative process, a legislature enacts two laws: One that authorizes a particular governmental action (an authorizing statute) and another that draws money from the State treasury to fund the action (an appropriation). In the typical case, appropriations are enacted annually in the State's budget process. Because an authorizing act and an appropriation are generally not enacted simultaneously, and often originate in separate legislative committees, there is the potential during the budget cycle for a diversion of motorcyclist fees to other purposes than motorcycle training or safety, even though language in the originating account may specify otherwise. For this reason, the agency requires citations to both the authorizing statute and the appropriation.

In response to the MAP–21 IFR, one commenter suggested that the agency be flexible and permit a State to demonstrate compliance without the need to submit its appropriation law as there are other laws that transfer funds without an appropriation. The commenter cites to one State's law as an example of a law that transfers motorcycle fees collected without an appropriation. That State's law provides that motorcycle fees are "appropriated on a continual basis" to the State Department of Transportation which shall administer the account. This is an example of a continuing appropriation, and citation to this provision would meet the requirement for a State to provide the citation to its appropriation law.[13] The agency requires the citation information described here to verify eligibility under this criterion, and declines to adopt the commenter's recommendation.

To confirm that a Data State has not diverted motorcyclist fees to another program, the State must submit detailed data and/or documentation that show that motorcyclist fees are collected and used only on motorcyclist training and safety. This requires a detailed showing from official records that revenues collected for the purposes of funding motorcycle training and safety programs were placed into a distinct account and expended only for motorcycle training and safety programs. The detailed documentation must include the account string, starting with the collection of the motorcycle fees into a specific location or account and following it to the expenditure of the funds, over a time period including the previous fiscal year. The documentation must provide NHTSA with the ability to "follow the money" to ensure that no diversion of funds takes place.

6. Award Limitation (23 CFR 1300.25(k))

The FAST Act amended the formula for allocation of grant funds under 23 U.S.C. 405(f), specifying that the allocation is to be in proportion to the State's apportionment under Section 402 for fiscal year 2009, instead of fiscal year 2003, bringing this grant into conformance with other Section 405 grants. In addition, the FAST Act amended the total amount a State may receive under 23 U.S.C. 405(f). Unlike the regulatory 10 percent cap identified for the other Section 405 grants in § 1300.20(e), the statute provides that a State may not receive more than 25% of its Section 402 apportionment for fiscal year 2009.

7. Use of Grant Funds (23 CFR 1300.25(l))

The FAST Act amended the eligible use of funds under this section. In addition to listing all the qualifying uses, the agency has reorganized this section under the IFR to list special rules that cover any other statutory requirement conditioning how grant funds are spent. Specifically, a State may use up to 50 percent of its grant funds under this section for any eligible project or activity under Section 402 if the State is in the lowest 25 percent of all States for motorcyclist deaths per 10,000 motorcycle registrations, based on the most recent data that conforms to criteria established by the Secretary (by delegation, NHTSA).

To determine if a State is eligible for this use of funds under Section 402, NHTSA will continue to use final FARS and FHWA registration data, as under MAP–21. Final FARS data provide the most comprehensive and quality-controlled fatality data for all 50 States, the District of Columbia, and Puerto Rico. FHWA motorcycle registration data are compiled in a single source for all 50 States, the District of Columbia, and Puerto Rico. The agency will make calculations and notify the States in January each year prior to the application due date of July 1.

8. Share the Road Model Language

The FAST Act mandates that within 1 year after its enactment, NHTSA update and provide to the States model language for use in traffic safety education courses, driver's manuals, and other driver training materials that provide instruction for drivers of motor vehicles on the importance of sharing the road safely with motorcyclists. NHTSA intends to update Share the Road language and make it available on its Web site located at *http://www.trafficsafetymarketing.gov.* In addition, the FAST Act requires a State to include the share the road language in its public awareness, public service announcements, and other outreach programs to enhance driver awareness of motorcyclists. (23 U.S.C. 405(f)(4)(A)(iv)) Today's IFR reflects this change.

9. Response to MAP–21 IFR Comments

In response to the MAP–21 IFR, the agency received two comments that are not addressed above. One commenter recommended that a universal motorcycle helmet law be included as a requirement to qualify for a Motorcyclist Safety Grant. Because the Federal statute does not include such a requirement to qualify for the grant, we decline to adopt this recommendation. Another commenter recommended that the agency allow States to cite to internet links to meet some requirements. We decline to adopt the use of internet links, as they are subject to change and therefore provide inadequate documentation and an insufficient audit trail.

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[13] The agency recognizes that certain statutes can act as both an authorization establishing the account into which the fees are deposited and a continuous appropriation (or "revolving fund") to pay out those fees for training, without the need for further appropriation. In such cases, the requirement to provide citations for both the statute authorizing the collection of fees and the appropriation would be met by providing a single citation to the continuous appropriation.

H. State Graduated Driver Licensing Grant (23 CFR 1300.26)

In general, a graduated driver's licensing (GDL) system consists of a multi-staged process for issuing driver's licenses to young, novice drivers to ensure that they gain valuable driving experience under controlled circumstances and demonstrate responsible driving behavior and proficiency to move through each level of the system before graduating to the next. All 50 States and the District of Columbia have enacted GDL laws as a means of providing a safe transition for novice drivers to the driving task. MAP–21 reintroduced an incentive grant for States to adopt and implement GDL laws (codified at 23 U.S.C. 405(g)). MAP–21 established a series of criteria that were prescriptive and difficult for States to meet. No State GDL incentive grants were awarded under MAP–21 due to the statute's strict compliance requirements.

The FAST Act resets the State GDL incentive grant program by significantly amending the statutory compliance criteria. It makes technical corrections, allows States additional flexibility to comply, reduces some driving restrictions, and better aligns the compliance criteria with commonly accepted best practices for GDL programs. The statutory requirements remain challenging, and it is possible that few States may comply in the first year of the revised program. However, the agency believes that because the new compliance criteria better reflect commonly accepted best practices and are more feasible for States to meet, some States will take action to amend their laws in order to qualify for a grant.

NHTSA based some of its implementation decisions in the MAP–21 IFR on research evidence, commonly accepted best practices, and public comments received under that program. Two commenters raised concerns about the agency's reliance on research evidence to establish certain qualification criteria. However, the FAST Act codified into law many of the NHTSA-established qualification criteria, including those cited by one of the commenters (minimum number of supervised behind-the-wheel training hours and nighttime driving restriction hours). As a result, NHTSA may no longer deviate from these criteria, and many of these requirements are therefore retained in this IFR.

The following sections explain the requirements of the State GDL incentive grant program under the FAST Act. In addition, the agency addresses public comments received on the MAP–21 IFR and, where appropriate, public comments received on a Notice of Proposed Rulemaking (NPRM) that NHTSA published on October 5, 2012, in the **Federal Register** seeking public comment on the statutory GDL requirements in MAP–21 (*see* 77 FR 60956).

1. Minimum Qualification Criteria

To qualify for a State GDL incentive grant, a State must submit an application with legal citations to the State statute(s) demonstrating compliance with the minimum qualification criteria specified in this IFR. (§ 1300.26(c)) Under 23 U.S.C. 405(g), as amended by the FAST Act, a State qualifies for an incentive grant if its driver's license law requires novice drivers younger than 18 years of age to comply with a "learner's permit stage" and an "intermediate stage" prior to receiving an unrestricted driver's license. (§ 1300.26(a)) Previously, under MAP–21, all novice drivers younger than 21 years of age were required to comply with such a 2-stage licensing process prior to receiving an unrestricted driver's license. This IFR reflects the statutory change from 21 years of age to 18 years of age. (§§ 1300.26(a), (d)(1)(i))

This change has significant impacts on NHTSA's interpretation of the minimum qualification criteria and their application to State laws. A number of commenters to the MAP–21 IFR and the NPRM requested clarification on the application of the GDL requirements to novice drivers age 18 and older. The agency need not address these comments because the FAST Act amendment lowered the evaluation age to 18, and therefore the requirements of the FAST Act do not extend to the State's treatment of novice drivers once they have reached that age. For example, under this IFR, the automatic issuance of an unrestricted driver's license upon turning 18 years of age (regardless of the length of time an intermediate license was held) will no longer prevent a State from qualifying for an incentive grant because the minimum qualification criteria must apply only up to, but not including, 18 years of age.

This IFR uses the commonly accepted term "unrestricted driver's license," as used in the FAST Act instead of "full driver's license," which was used in the MAP–21 IFR. (§ 1300.26(b)) In the MAP–21 IFR, NHTSA used the term "full driver's license" to avoid confusion with driver licenses containing such restrictions as a requirement to wear corrective lenses. However, the FAST Act continues to use "unrestricted driver's license," and NHTSA believes that phrase is well-understood. This IFR defines "unrestricted driver's license" to mean "full, non-provisional driver's licensure to operate a motor vehicle on public roadways." An "unrestricted driver's license" for purposes of this section may include narrow restrictions such as requiring use of corrective lenses or assistive devices. However, it does not include learner's permits, intermediate licenses, or other similar restricted licenses.

The following sections describe the minimum qualification criteria for the learner's permit stage and the intermediate stage that all novice drivers younger than 18 years of age must complete prior to receiving an unrestricted driver's license in order for the State to qualify for an incentive grant. The agency does not have statutory authority in 23 U.S.C. 405(g) to allow States to meet only a few of the minimum qualification criteria dictated by the FAST Act or to phase in the program over several years, as recommended by some commenters. In addition, because the FAST Act sets minimum qualification criteria, NHTSA cannot award grants while allowing States complete flexibility to set "their own restrictions based on their unique conditions and problems," as one commenter suggested.

2. Learner's Permit Stage (23 CFR 1300.26(d))

The FAST Act requires all 2-stage licensing processes to begin with a learner's permit stage. This IFR requires a State driver's licensing statute to include a learner's permit stage that applies to any driver who is younger than 18 years of age prior to being issued by the State any other permit, license, or endorsement to operate a motor vehicle on public roadways. However, recognizing that some drivers younger than 18 years of age may change residence across State lines, a learner's permit stage is not required for any driver who has already received an intermediate license or unrestricted driver's license from any State, including a State that does not meet the minimum qualification criteria for an incentive grant. Drivers younger than 18 years of age who possess only a learner's permit from another State must be integrated into the State's learner's permit stage.

The FAST Act requires applicants to successfully pass a vision and knowledge assessment prior to receiving a learner's permit. A "knowledge assessment" (commonly called a "written test") is generally written or computerized, as opposed to a behind-the-wheel assessment. The assessment must cover issues related to the driving task (including, but not limited to, the rules of the road, signs, and signals), rather than solely vehicle maintenance.

Under the FAST Act and the IFR, the learner's permit stage must be at least six months in duration, and it must remain in effect until the driver reaches 16 years of age and enters the intermediate stage or reaches 18 years of age. These requirements are independent and must each be satisfied. For example, a learner's permit stage that automatically ends with the issuance of an intermediate license at age 17 would not comply with the minimum requirements because, in some cases, it may not be in effect for a period of at least 6 months. However, a learner's permit stage that automatically ends at age 18 would not be a bar to compliance because, as discussed above, a State's GDL program is not required to cover drivers who have reached that age. A driver who successfully completes the learner's permit stage and is younger than 18 must enter the intermediate stage; he or she may not be issued an unrestricted driver's license or any other permit, license, or endorsement.

The key feature of a learner's permit stage is the requirement that the learner's permit holder be accompanied and supervised at all times while operating a motor vehicle. The FAST Act and this IFR require that the supervising individual be a licensed driver who is at least 21 years of age or a State-certified driving instructor. The IFR defines "licensed driver" to mean "an individual who possess a valid unrestricted driver's license." (§ 1300.26(b)). An individual who possesses only a learner's permit or intermediate license, or whose license is expired, suspended, revoked, or otherwise invalid for any reason, may not supervise a learner's permit holder. The FAST Act does not allow for any exceptions to the requirement that a learner's permit holder be accompanied and supervised "*at all times* while the driver is operating a motor vehicle." (23 U.S.C. 405(g)(2)(B)(i)(IV) (emphasis added)) A State that allows a learner's permit holder to drive a motor vehicle without being properly accompanied or supervised for any reason, including in an emergency, would not qualify for an incentive grant.

With regard to driver's education (or a similar training course) and behind-the-wheel training, both of which were required under MAP–21, the FAST Act provides significantly more flexibility. Some commenters to the MAP–21 IFR noted that driver's education was difficult to implement in rural areas, that evidence on the effectiveness of driver's education courses is mixed, and that States facing budgetary challenges may face an insurmountable burden in certifying driver's education courses and requiring all learner's permit holders to attend them. Under the FAST Act, a learner's permit holder must *either* complete a State-certified driver's education or training course[14] *or* receive at least 50 hours of behind-the-wheel training, with at least 10 of those hours at night, with a licensed driver. This IFR includes this requirement, but makes clear that the licensed driver for behind-the-wheel training must be at least 21 years of age or a State-certified driving instructor, in order for it to align with the general accompaniment and supervision requirement explained above. This IFR clarifies that the 10 hours of nighttime behind-the-wheel training are included in the 50 hours of total behind-the-wheel training, not an additional requirement. NHTSA declines to define "night" for purposes of this requirement or to dictate how a State may verify that the training has occurred. At this time, the agency believes those determinations are best left to the State.

To qualify, a State must also make it a primary offense for a learner's permit holder to use a personal wireless communications device while driving. The FAST Act made a few changes to this distracted driving provision of the GDL program ("GDL prohibition") to bring it into closer alignment with the criteria to qualify for a Distracted Driving Grant (under 23 CFR § 1300.24). First, the GDL prohibition bans the use of any "personal wireless communications device," which has a common definition in both programs. Second, the GDL prohibition uses the Distracted Driving Grant definition of "driving." Finally, the same exceptions permitted under the Distracted Driving Grant are permitted under this GDL prohibition. To bring these further into alignment, NHTSA has incorporated into the GDL prohibition the requirement under the Distracted Driving Grant that the State's statute not include an exemption that specifically allows a driver to text through a personal wireless communication device while stopped in traffic. This provision goes to the heart of how the agency interprets "driving" as it applies to State laws, and will ensure consistency between the programs. As under the MAP–21 IFR and the Distracted Driving Grant, violation of the GDL prohibition must be a primary offense. However, NHTSA is not incorporating the minimum fine requirement of the Distracted Driving Grant into the GDL prohibition. It is not expressly required under the FAST Act to qualify for a State GDL incentive grant, and the automatic extension requirement (discussed next) already provides for an appropriate penalty under a GDL program.

Finally, under this IFR, the learner's permit stage must require that, in addition to any other penalties imposed by State statute, its duration be extended if the learner's permit holder is convicted of a driving-related offense or misrepresentation of a driver's true age during at least the first six months of that stage. Under the FAST Act, NHTSA has discretion to define any "driving-related offense" for which this penalty must apply. (23 U.S.C. 405(g)(2)(B)(iii)) NHTSA has defined "driving-related offense" broadly to include "any offense under State or local law relating to the use or operation of a motor vehicle." Further, the IFR provides examples of such offenses, including those from the FAST Act (driving while intoxicated, reckless driving, driving without wearing a seat belt, and speeding), other priority safety programs (child restraint violation and prohibited use of a personal wireless communications device), any violation of a GDL program, and general "moving violations." NHTSA believes that an extension of the learner's permit period is an effective tool for ensuring that novice drivers clearly demonstrate responsibility before advancing to a licensure stage requiring less supervision, and therefore it should apply to any violation of the State's driving laws. However, the IFR makes clear that "driving-related offense" does not include offenses related to motor vehicle registration, insurance, parking, or the presence or functionality of motor vehicle equipment (such as headlights or taillights that require replacement). As motor vehicles are often owned by the parents of novice drivers, NHTSA does not believe that offenses related to the vehicles themselves (registration, insurance, or functioning of equipment) should apply to the novice driver. Parking violations are also excluded from the definition because the violation generally applies to the owner of the vehicle, and such violations do not generally implicate safety. We note that offenses such as failure to turn on headlights during nighttime hours are generally moving violations in States and are entirely within the control of a novice driver, in which case they must result in the extension of the learner's permit stage upon conviction.

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[14] NHTSA encourages States to consider establishing driver training curriculum standards based on the national standards recommended in the Driver Education Working Group. (National Highway Traffic Safety Administration (October 2009) *Novice Teen Driver Education and Training Administrative Standards.*)

The FAST Act also changed the automatic extension requirement in the MAP–21 IFR by applying this penalty only during the first six months of the stage, not for its entirety. A State that requires the extension of a learner's permit stage for a conviction that occurs after the first six months would not be disqualified from a grant, but it is no longer required. At this time, NHTSA is not requiring that the learner's permit stage extension be for a particular length of time.

3. Intermediate Stage (23 CFR 1300.26(e))

The FAST Act requires all 2-stage licensing processes to continue with an intermediate stage after the learner's permit stage but prior to receipt of an unrestricted license. As discussed above, the intermediate stage must apply to any novice driver who completes the learner's permit stage and is less than 18 years of age. (23 CFR §§ 1300.26(a), (d)(3), (e)(1)(i)) If a driver completes the learner's permit stage after turning 18 years of age, he or she is not required to participate in an intermediate stage and may receive an unrestricted license.

Under the IFR, the intermediate stage must commence after the applicant successfully completes the learner's permit stage, but prior to being issued by the State another permit, license, or endorsement (other than the intermediate license) to operate a motor vehicle on public roadways. This structure allows for a gap between the learner's permit stage and the intermediate stage, in the event the former expires prior to the novice driver being issued the latter. However, the novice driver may not be granted additional driving privileges beyond the intermediate stage until completion of that stage. In addition, the novice driver may not be issued an intermediate stage license until after he or she has passed a behind-the-wheel driving skills assessment (commonly known as a "road test").

The intermediate stage must be in effect for a period of at least 6 months, and it must remain in effect until the intermediate license holder reaches at least 17 years of age. Thus, a State will not qualify for an incentive grant if it issues additional permits, licenses (including an unrestricted driver's license), or endorsements to an intermediate stage driver who has not reached at least 17 years of age and completed the requirements of that stage. As described above, a State may now qualify for an incentive grant if the intermediate stage expires automatically upon reaching 18 years of age, because drivers are no longer required to complete a 2-stage driving process once they have reached that age.

One of the two primary features of an intermediate stage in a GDL program is nighttime driving restrictions. Under the IFR, for the first six months of the intermediate stage, the driver must be accompanied and supervised by a licensed driver who is at least 21 years of age or a State-certified driving instructor while operating a motor vehicle between the hours of 10:00 p.m. and 5:00 a.m. The FAST Act changed this requirement as it existed under MAP–21 to apply only to the first six months of the intermediate stage, rather than to the entire stage. The FAST Act adopted the MAP–21 nighttime hours of 10:00 p.m. through 5:00 a.m., but added additional exceptions for "transportation to work, school, religious activities, or emergencies." NHTSA believes that "to" was not intended to limit such exceptions to driving only toward these destinations and not to returning from these destinations. The IFR makes clear that the exceptions may apply to driving "for the purposes of work, school, religious activities, or emergencies." This broadening of the nighttime driving exceptions should address the comments received in response to the MAP–21 IFR. Consistent with the purpose of the statute, the IFR allows accompaniment by a State-certified driving instructor, in addition to someone at least 21 years of age, to better align the accompaniment and supervision requirement with the learner's permit stage, as well as to allow for formal training during nighttime hours.

The second primary feature of an intermediate stage in a GDL program is the passenger restriction. The IFR requires that, for the entirety of the learner's permit stage, an intermediate license holder be prohibited from operating a motor vehicle with more than one nonfamilial passenger younger than 21 years of age unless a licensed driver who is at least 21 years of age or is a State-certified driving instructor is in the motor vehicle. This requirement is essentially unchanged from the MAP–21 IFR, though NHTSA has allowed a State-certified driving instructor to accompany a driver with more than one nonfamilial passenger younger than 21 years of age in order to allow for group behind-the-wheel training and ensure consistency with the learner's permit phase. We emphasize that the FAST Act does not include a 6-month limitation on this restriction; therefore, it must apply for the entirety of the intermediate stage.

Finally, the intermediate stage must include a prohibition on the use of a personal wireless communications device while driving and a requirement that the stage be extended if the intermediate license holder is convicted of a driving related offense or misrepresentation of a driver's true age during at least the first 6 months of the stage. The language of these restrictions is identical in the FAST Act for both the learner's permit and intermediate stages, and the IFR applies these restrictions to both stages identically.

4. Additional Changes From MAP–21 IFR

The MAP–21 IFR included a requirement that the State's learner's permit, intermediate license, and full driver's license be distinguishable from each other. One commenter did not support this license distinguishability criterion, stating it was not an inherent aspect of GDL law or directly related to improving the safety of novice drivers. The FAST Act repealed the statutory provision that gave NHTSA authority to prescribe additional requirements for State GDL programs to qualify for an incentive grant. License distinguishability was not included as a requirement in the FAST Act. For this reason, NHTSA removes this requirement to qualify for a GDL grant.

5. Exceptions to a State's GDL Program (23 CFR 1300.26(f))

MAP–21 created limited exceptions for States that enacted a law prior to January 1, 2011, establishing either of the following two classes of permit or license: a permit or license that allows drivers younger than 18 years of age to operate a motor vehicle in connection with work performed on, or the operation of, a farm owned by family members who are directly related; or a permit or license that is issued because demonstrable hardship would result from its denial to the licensee or applicant. For the second class of permit or license, the MAP–21 IFR clarified that a demonstration of unique, individualized hardship was required. Further, the MAP–21 IFR made clear that although novice drivers may possess one of these classes of permits or licenses, States were not permitted to provide them any other permit, license or endorsement until they completed the GDL process. The FAST Act did not amend the exceptions that are permitted in State GDL programs. As a result, they are maintained in this IFR.

6. Grant Awards and Use of Grant Funds (23 CFR 1300.26(g), (h))

Under MAP–21, NHTSA was required to award grants to States that met the qualification criteria on the basis of the apportionment formula under Section 402 for that fiscal year. The FAST Act did not amend this provision, so it continues to be used in this IFR. (23 CFR 1300.26(g)) This grant award formula for the State GDL incentive grant program differs from the formula for the other Section 405 programs, where distributions are made in proportion to the State's apportionment under Section 402 for fiscal year 2009.

In addition to listing all the qualifying uses, the agency has reorganized this section under the IFR to list special rules that cover any other statutory requirement conditioning how grant funds are spent. As a general rule, grant funds must be used for certain expenses connected with the State's GDL law or to carry out a teen traffic safety program under 23 U.S.C. 402(m). Notwithstanding these uses, a State may use no more than 75 percent of the grant funds for any eligible project under Section 402. In addition, the FAST Act creates a special rule for low fatality States that allows them to use up to 100 percent of the grant funds awarded under this section for any eligible project under Section 402. Low fatality States are defined in the FAST Act as those "in the lowest 25 percent of all States for the number of drivers under age 18 involved in fatal crashes in the State per the total number of drivers under age 18 in the State based on the most recent data that conforms with criteria established by the Secretary." For fatality information, the agency intends to use the most recently available final FARS data. For number of drivers, the agency intends to use Table DL–22 from the most recently available FHWA Highway Statistics publication issued by its Office of Highway Policy Information.[15]

I. Nonmotorized Safety Grants (23 CFR 1300.27)

The FAST Act created a new Nonmotorized Safety Grant program, authorizing grants to enhance safety for bicyclists and pedestrians. The purpose of the new grant program is to support State efforts to decrease pedestrian and bicyclist fatalities and injuries that result from crashes involving a motor vehicle.

For assistance in developing nonmotorized safety programs, NHTSA encourages States to look to NHTSA's Uniform Guidelines for State Highway Safety Programs No. 14—Pedestrian and Bicycle Safety.[16]

1. Eligibility Determination (23 CFR 1300.27(b))

As directed in the FAST Act, States are eligible for the Nonmotorized Safety Grant if the annual combined pedestrian and bicyclist fatalities in the State exceed 15 percent of the total annual crash fatalities in the State using the most recently available final data from NHTSA's FARS. Recently, FHWA established a nonmotorized performance measure for State departments of transportation to use to carry out the HSIP and to assess the number of serious injuries and fatalities of nonmotorized users. In creating this performance measure, FHWA includes other nonmotorized users besides pedestrians and bicyclists in its calculation of the "number of non-motorized fatalities." However for the Nonmotorized Safety Grant program, the FAST Act specifies that eligible States shall receive a grant for "the purpose of decreasing pedestrian and bicycle fatalities and injuries that result from crashes involving a motor vehicle," and does not mention other types of nonmotorized users. Using FARS data, NHTSA will calculate the percentage of each State's annual combined pedestrian and bicyclist fatalities in relation to the State's annual total crash fatalities, using Statistical Analysis System (SAS) software. NHTSA will not round or truncate this calculation. All States that exceed 15 percent will be eligible for a grant.

In January each year prior to the application due date, the agency will inform each State that is eligible for a grant.

2. Qualification Criteria (23 CFR 1300.27(c))

To qualify for a grant under this section, an eligible State must provide assurances that the State will use grant funds awarded under 23 U.S.C. 405(h) only for authorized uses.

3. Use of Grant Funds (23 CFR 1300.27(d))

The FAST Act specifies with particularity how States may use Nonmotorized Safety Grant funds. The IFR adopts the FAST Act language without change.

J. Racial Profiling Data Collection Grants (23 CFR 1300.28)

Section 1906 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy For Users (SAFETEA–LU) established an incentive grant program to prohibit racial profiling. Section 4011 of the FAST Act revised several aspects of the Section 1906 Program.

1. Purpose (23 CFR 1300.28(a))

The purpose of the SAFETEA–LU grant program was to encourage States to enact and enforce laws that prohibit the use of racial profiling in traffic law enforcement and to maintain and allow public inspection of statistical information regarding the race and ethnicity of the driver and any passengers for each motor vehicle stop in the State. The purpose of the new Section 1906 grant program is to encourage States to maintain and allow public inspection of statistical information on the race and ethnicity of the driver for all motor vehicle stops made on all public roads except those classified as local or minor rural roads.

2. Qualification Criteria (23 CFR 1300.28(b))

Under the SAFETEA–LU Section 1906 Program, States could qualify for a grant in one of two ways: (a) By enacting and enforcing a law that prohibits the use of racial profiling in the enforcement of State laws regulating the use of Federal-aid highways *and* maintaining and allowing public inspection of statistical information on the race and ethnicity of the driver and any passengers for each such motor vehicle stop made by a law enforcement officer on a Federal-aid highway (a "Law State"); or (b) by providing satisfactory assurances that the State is undertaking activities to prohibit racial profiling and to maintain and provide public access to data on the race and ethnicity of the driver and passengers for each motor vehicle stop made by a law enforcement officer on a Federal-aid highway (an "Assurances State"). A State could not receive a grant for more than two fiscal years by qualifying for the grant as an Assurances State.

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[15] In collecting data for Table DL–22, FHWA requests that States include the total number of drivers with intermediate or unrestricted driver's licenses, but exclude learner's permits. NHTSA will therefore exclude learner's permit holders involved in fatal crashes from its FARS data for purposes of this calculation to ensure consistency and discourage States from shortening their learner's permit stages to improve their driver involvement rates in fatal crashes. In addition, because few States report data for drivers younger than 16 years of age, NHTSA's calculation of driver involved rates in fatal crashes will only include 16- and 17-year-old drivers, and exclude drivers younger than 16 years of age.

[16] *See http://www.nhtsa.gov/nhtsa/whatsup/tea21/tea21programs/pages/PedBikeSafety.htm.* States may also look to NHTSA's training courses on pedestrian safety training for law enforcement and enhancing bicycle safety. *See http://www.nhtsa.gov/Driving+Safety/Pedestrians/Pedestrian+Safety+Training+for+Law+Enforcement+(CD–ROM)* and *http://www.nhtsa.gov/Driving+Safety/Bicycles/Enhancing+Bicycle+Safety:+Law+Enforcement's+Role.*

Section 4011 of the FAST Act revised several aspects of the Section 1906 grant program. States now may qualify for a 1906 grant by: (1) Maintaining and allowing public inspection of statistical information on the race and ethnicity of the driver for each motor vehicle stop made by a law enforcement officer on a Federal-aid highway; or (2) undertaking activities during the fiscal year of the grant to do so. Under the new 1906 Program, the clear emphasis is to encourage States to maintain and provide public access to statistical information on the race and ethnicity of drivers stopped by law enforcement officers on Federal-aid highways. This requirement extends to all law enforcement officers in a State, including local law enforcement. Use of the term "Federal-aid highway" is governed by Chapter 1 of Title 23, which defines it as a highway eligible for assistance under Chapter 1 other than a highway classified as a local road or rural minor collector. Consequently, the program's data collection requirement extends to all public roads except local and minor rural roads.

To qualify under the first criterion, the State must submit official documents (*i.e.,* a law, regulation, binding policy directive, letter from the Governor or court order) demonstrating that the State maintains and allows public inspection of statistical information on the race and ethnicity of drivers stopped by law enforcement officers on Federal-aid highways. To qualify under the second criterion, the State must provide assurances that the State will undertake activities to do so and provide a list of one or more projects in the HSP to support the assurances.

3. Limitations (23 CFR 1300.28(c))

The FAST Act places two limitations on grants. First, a State may not qualify for a grant under this section by providing assurances for more than two fiscal years. This IFR adopts this requirement.

The FAST Act also limits the total amount of grant funds awarded to a State each fiscal year. A State may not receive more than 5 percent of the grant funds made available under this section. By statute, NHTSA may reallocate funds not awarded under this section to carry out any of other activities authorized under 23 U.S.C. 403. (Activities authorized under 23 U.S.C. 403 are beyond the scope of this rule.)

4. Use of Grant Funds (23 CFR 1300.28(d))

Consistent with its emphasis on data collection, the new 1906 Program now provides that a State may use grant funds only for the costs of (1) collecting and maintaining data on traffic stops; and (2) evaluating the results of the data.

V. Administration of Highway Safety Grants

Today's action makes nonsubstantive changes to some sections and amends other sections to clarify existing requirements, provide for improved accountability of Federal funds and update requirements based on the Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Awards, 2 CFR part 200, and the Department of Transportation's implementing regulation at 2 CFR part 1201.

A. Nonsubstantive Changes

In subparts D and E, the agency makes nonsubstantive changes, such as updating cross references, and terms, and adding references to Section 1906. Specifically, the agency makes nonsubstantive and clarifying changes to the following provisions in subparts D and E: §§ 1300.30 General, 1300.31 Equipment, 1300.36 Appeals of Written Decisions by a Regional Administrator, and 1300.42 Post-Grant Adjustments, 1300.43 Continuing Requirements.

B. Governmentwide Uniform Grant Requirements

A number of other requirements apply to the Section 402, 405 and 1906 programs, including such government-wide provisions as the Office of Management and Budget (OMB) Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 CFR part 200) and DOT's implementing regulations of those Uniform Administrative Requirements (2 CFR part 1201). These provisions are independent of today's notice, and continue to apply in accordance with their terms. Throughout this IFR, citations to 49 CFR parts 18 and 19 and to OMB Circulars have been updated to refer to OMB's Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards as well as DOT's implementing regulations (2 CFR parts 200 and 1201). In addition, NHTSA has added citations to various provisions of OMB's Uniform Administrative Requirements throughout this IFR in order to provide additional notice to States about certain provisions, including risk assessment and consequences of non-compliance with government-wide or NHTSA grant requirements. Finally, NHTSA has deleted the provision on program income (§ 1300.34), and will rely the Uniform Administrative Requirements to address program income.

C. Updated Administrative Procedures of Note

The agency is responsible for overseeing and monitoring implementation of the grant programs to help ensure that recipients are meeting program and accountability requirements. Oversight procedures for monitoring the recipients' use of awarded funds can help the agency determine whether recipients are operating efficiently and effectively. Effective oversight procedures based on internal control standards for monitoring the recipients' use of awarded funds are key to ensuring that program funds are being spent in a manner consistent with statute and regulation. In order to improve oversight of grantee activities and management of federal funds, this IFR updates the procedures for administering the highway safety grant programs.

1. Amendments to the Highway Safety Plans (23 CFR 1300.32)

As noted in Section II.A. above, NHTSA anticipates implementing the Grants Management Solutions Suite (GMSS) beginning with fiscal year 2018 grants. GMSS satisfies the FAST Act requirement that NHTSA allow States to submit HSPs electronically. States will submit their HSPs electronically in GMSS to apply for grants. In addition, States will amend their HSPs and submit vouchers in GMSS. The agency expects GMSS to reduce the administrative burden on States. This IFR continues the existing requirement for approval of changes in the HSP by Regional Administrators. Today's action makes conforming changes to § 1300.32, including deleting the reference to the HS Form 217, which will no longer be required.

2. Vouchers and Project Agreement (23 CFR 1300.33)

While grantees or recipients have primary responsibility to administer, manage, and account for the use of grant funds, the Federal grant-awarding agency retains responsibility for oversight in accordance with applicable laws and regulations. Changes to the regulation are necessary to reflect the complexity of current grant programs and to ensure effective oversight. Today's action requires additional documentation from States when submitting vouchers so that the agency has information linking vouchers to expenditures prior to approving reimbursements and to assist subsequent audits and reviews.

Consistent with the agency's expected implementation of GMSS, today's action amends § 1300.33. Most paragraphs in this section remain unchanged except for nonsubstantive updates to cross-references and terms. This IFR amends the content of the vouchers to conform with the implementation of GMSS and the revised HSP content requirements. As is currently required, States will continue to identify the amount of Federal funds for reimbursement, amount of Federal funds allocated to local benefit, and matching rate. In order to better maintain oversight of Federal grant funds, this IFR requires States to identify project numbers, amount of indirect cost, amount of planning and administration costs and program funding code. To ease the burden on States, the agency is working to program GMSS to populate a number of fields, such as project number and program funding code, from the HSP submission so that States will not have to upload duplicative entries into GMSS.

In response to the MAP–21 IFR, one commenter stated that a list of projects and project numbers was too burdensome because it would require, among other things, double entries. NHTSA is responsible for oversight in accordance with applicable laws and regulations. Without such information, the agency is unable to track whether grant funds are used in accordance with Federal law, including the period of availability for such funds. As stated above, NHTSA expects to implement GMSS to accept the submission of HSPs electronically so that many of the fields will automatically populate, and thus reduce the burden on States.

With these changes, the agency will be better able to track the State's expenditure of grant funds.

3. Annual Report (23 CFR 1300.35)

Today's action retains much of the existing requirements for the State's annual report and makes two targeted additions to require a description of the State's evidence-based enforcement program activities and an explanation of reasons for projects that were not implemented. The statute requires States to have sustained enforcement of traffic safety laws (*i.e.*, impaired driving, occupant protection and driving in excess of posted speed limits) as a condition of a Section 402 grant. (23 U.S.C. 402(b)(1)) The HSP that is approved by NHTSA contains information about the projects that the State intends to implement to meet performance targets. In order to improve oversight of grantee activities and management of federal funds, the IFR updates the annual report to require a description of the State's enforcement activities and an explanation of reasons for projects that were approved by NHTSA but not implemented. To ease the State's burden, NHTSA expects that States will be able to submit this information through GMSS beginning with fiscal year 2018.

4. Disposition of Unexpended Balances (23 CFR 1300.41)

A fundamental expectation of Congress is that funds made available to States will be used promptly and effectively to address the highway safety problems for which they were authorized. Section 402 and 405 grant funds are authorized for apportionment or allocation each fiscal year. Because these funds are made available each fiscal year, it is expected that States will strive to use these grant funds to carry out highway safety programs during the fiscal year of the grant. States should, to the fullest extent possible, expend these funds during the fiscal year to meet the intent of the Congress in funding an annual program.

Today's action retains many provisions in the MAP–21 IFR, such as the provision on deobligation of funds, but conforms the treatment of carry-forward funds to the revised HSP content requirements in § 1300.11(d). Two commenters to the MAP–21 IFR sought clarification on the treatment of grant funds awarded under previous authorizations. As provided in the MAP–21 IFR, the codified regulations in place at the time of grant award continue to apply.

D. Sanctions

Today's action reorganizes and clarifies 23 CFR 1300.51 in accordance with 23 U.S.C. 402(c). No substantive changes are made to this section.

This IFR adds a new sanction provision (23 CFR 1300.52) related to risk assessment and noncompliance with Federal requirements for grants. The OMB Circular (2 CFR part 200) introduced increased risk assessment procedures for Federal agencies and sub-recipients. This IFR explains that NHTSA will conduct risk assessments and incorporate risk assessment results into existing grant monitoring activities. NHTSA may impose conditions proportional to the degree of risk found.

VI. Special Provisions for Fiscal Year 2017 Grants

A. Fiscal Year 2017 Grant Applications (23 CFR 1300.60)

The FAST Act left a number of the National Priority Safety Program grants unchanged, provided additional flexibility for States to receive grants under others, and established new grants. Today's action streamlines and consolidates grant application requirements for Sections 402, 405 and 1906. For Section 402 grants, States are required to submit HSPs with performance measures and targets, a strategy for programming funds on projects and activities, and data and data analysis supporting the effectiveness of the countermeasures for NHTSA's approval. This IFR revises some of the HSP content requirements to allow States to use the HSP contents to not only meet the Section 402 requirements, but also meet some of the Section 405 grant requirements.

While these changes to the HSP and Section 405 grant requirements will reduce the application burden on States, NHTSA is not making these changes a requirement for fiscal year 2017 grants. States begin drafting their HSP for the next fiscal year months in advance of the July 1 application deadline. It would be difficult for States to meet the revised requirements in the short time between the issuance of this IFR and July 1, 2016.

In order to limit any disruption to the State highway safety program planning process, the amendments to the application requirements in this part are not mandatory until the fiscal year 2018 application cycle for grants without substantive changes in the FAST Act. For those grants (Occupant Protection Grants, State Traffic Safety Information System Improvements Grants, Impaired Driving Countermeasures Grants and Motorcyclist Safety Grants), States may follow the application requirements in the MAP–21 IFR (Part 1200). As discussed in Section I, for additional flexibility, States may elect to follow the new procedures (*i.e.*, the part 1300 requirements) for fiscal year 2017 grant applications for these grants that were not substantively changed by the FAST Act. Specifically, States should submit applications in accordance with the following instructions:

Grant application	Requirement	
HSP contents	§ 1200.11	§ 1300.11
Section 405(b) Occupant Protection Grants	§ 1200.21(d)(1)–(4) and (e); § 1300.21(d)(5) [17] (maintenance of effort).	§ 1300.21(d)(1)–(5)
Section 405(c) State Traffic Safety System Improvements Grants.	§ 1200.22(b)–(e); § 1300.22(c) [17] (maintenance of effort)	§ 1300.22(b)–(c)
Section 405(d)(1) Impaired Driving Countermeasures Grants.	§ 1200.23(d)(1), (e), (f); § 1300.23(d)(2) [17] (maintenance of effort).	§ 1300.23(d)–(f)
Section 405(f) Motorcyclist Safety Grants	§ 1200.25(d)–(j)	§ 1300.25(d)–(j)

For Section 405 grants for which the FAST Act provided additional flexibility (Alcohol-Ignition Interlock Law Grants, Distracted Driving Grants and State Graduated Driver Licensing Incentive Grants) and for new grants (24–7 Sobriety Grants, Nonmotorized Grants and Racial Profiling Data Collection Grants), States should submit applications in accordance with this part. Specifically, States must submit applications in accordance with the following instructions:

Grant application	Requirement
Section 405(d)(6) Grants to States with Alcohol-Ignition Interlock	§ 1300.23(g)
Section 405(d)(6) Grants to States with 24–7 Sobriety Program Grants	§ 1300.23(h)
Section 405(e) Distracted Driving (and Special Distracted Driving) Grants	§ 1300.24
Section 405(g) State Graduated Driver Licensing Incentive Grants	§ 1300.26
Section 405(h) Nonmotorized Safety Grants	§ 1300.27
Section 1906 Racial Profiling Data Collection Grants	§ 1300.28

B. Fiscal Year 2017 Grants—General and Administrative Provisions (23 CFR 1300.61)

Today's action makes a number of changes to the general and administrative provisions applicable to grants awarded under 23 U.S.C. Chapter 4 and Section 1906. In order to reduce the burden on States, the agency is delaying the applicability of some of these provisions. Specifically, the provisions that impact the HSP contents and the process for reimbursement of grant expenditures are delayed until fiscal year 2018 grants.

For fiscal year 2017 grants awarded under 23 U.S.C. Chapter 4 and Section 1906, the following provisions from part 1300 are applicable:

- Subpart A—all sections;
- Subpart B: 23 CFR 1300.10 General; 23 CFR 1300.12 Due Date for Submission; (iii) 23 CFR 1300.13 Special Funding Conditions for Section 402 Grants; (iv) 23 CFR 1300.15 Apportionment and Obligation of Federal Funds;
- Subpart C—23 CFR 1300.20 General; 23 CFR 1300.21(a)–(c) and (f); 23 CFR 1300.22(a) and (d); 23 CFR 1300.23(a)–(c), (i) and (j); 23 CFR 1300.1300.24—all paragraphs; 23 CFR 1300.25(a)–(c), (k) and (l); 23 CFR 1300.26—all paragraphs; 23 CFR 1300.27—all paragraphs; 23 CFR 1300.28—all paragraphs;
- Subpart D: 23 CFR 1300.30 General; 23 CFR 1300.31 Equipment; 23 CFR 1300.35 Annual Report; 23 CFR 1300.36 Appeals of Written Decision by Regional Administrator;
- Subpart E—all sections;
- Subpart F—all sections.

For all other general or administrative provisions, the following provisions of 23 CFR part 1200 apply for fiscal year 2017—

- Subpart B—23 CFR 1200.14 Review and Approval Procedures;
- Subpart D: 23 CFR 1200.32 Changes—Approval of the Approving Official (Regional Administrator); 23 CFR 1200.33 Vouchers and Project Agreements.

VII. MAP–21 Comments

This preamble addressed comments from the MAP–21 IFR in applicable sections. Some comments, however, were of general applicability or applied to multiple sections of the IFR. Those comments are addressed in this section.

One commenter suggested that States conduct their own assessments rather than NHTSA-facilitated assessments. There are a number of assessment requirements within MAP–21 and continued under the FAST Act, *e.g.*, two assessments under the Occupant Protection Grant, a traffic record system assessment and an impaired driving assessment. These are statutory requirements. In the MAP–21 IFR, the agency specified that these would be NHTSA-facilitated assessments. Consistent with the MAP–21 IFR, we continue to define an assessment as a NHTSA-facilitated process. The agency's involvement will ensure a comprehensive treatment and uniformity among all States receiving assessments. This approach also is consistent with NHTSA's long-standing involvement in conducting assessments of traffic safety activities and programs.

One commenter sought clarification about whether grant funds may be used to fund an impaired driving task force. While the question was specific to the impaired driving task force, there are other grants where task forces or similar entities are requirements for a Section 405 grant. Generally, under the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, costs incurred by advisory councils or committees are unallowable unless authorized by statute, the Federal awarding agency or as an indirect cost where allocable to Federal awards. 2 CFR 200.422. As the agency stated in response to questions about the Cost Principles, the costs of advisory councils (or similar entities) are not allowable if the advisory council or entity is required to qualify for a grant by which it is funded (*e.g.*, the costs of a task force required to qualify for a Section 405 grant may not be reimbursed using Section 405 funds. However, those costs may be allowable using other NHTSA grant funds.

Several commenters had questions about the qualification requirements for MAP–21 grants based on enactment of laws. Most of these commenters stated that the MAP–21 IFR did not provide sufficient time for State legislatures to amend laws to qualify for grants in fiscal year 2014. Most of the law-based qualification requirements in MAP–21 and the FAST Act are based on statutory requirements. NHTSA encouraged States to review the FAST Act to become familiar with these requirements in advance of publishing the regulation. NHTSA does not have much discretion in these law-based qualification requirements. As a long term authorization, the FAST ACT provides States with more lead time to amend State laws to comply with grant requirements, and it provides additional flexibility to meet grant requirements.

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[17] The FAST Act maintenance of effort requirements for occupant protection, State traffic information system improvements and impaired driving countermeasures are effective for fiscal year 2017 grants. (23 U.S.C. 405(a)(9)).

VIII. Notice and Comment, Effective Date and Request for Comments

The Administrative Procedure Act authorizes agencies to dispense with certain procedures for rules when they find "good cause" to do so. The FAST Act contains a general provision requiring the agency to award grants through rulemaking and continues the specific provision requiring the agency to award the GDL grants through notice and comment provisions under 5 U.S.C. 553. The agency finds good cause to dispense with the notice and comment requirements and the 30-day delayed effective date requirement.

Under Section 553(b)(B), the requirements of notice and comment do not apply when the agency, for good cause, finds that those procedures are "impracticable, unnecessary, or contrary to public interest." Because the statutory deadline for fiscal year 2017 grant applications is July 1, 2016, the agency finds it impracticable to implement the grant provisions with notice and comment. However, the agency invites public comment on all aspects of this IFR as the agency intends to address comments in a final rule.

Under Section 553(d), the agency may make a rule effective immediately, avoiding the 30-day delayed effective date requirement for good cause. We have determined that it is in the public interest for this final rule to have an immediate effective date. NHTSA is expediting a rulemaking to provide notice to the States of the requirements for the substantively changed grants and the new grants established by the FAST Act. NHTSA is providing the option for States to apply the new requirements immediately to all grants, and this also requires an expedited rule. The fiscal year 2017 grant funds must be awarded to States before the end of the fiscal year 2016, and States need the time to complete their fiscal year 2017 grant applications before the July 1, 2016 deadline. Early publication of the rule setting forth the requirements for State applications for multiple grants that have separate qualification requirements is therefore imperative.

For these reasons, NHTSA is issuing this rulemaking as an interim final rule that will be effective immediately. As an interim final rule, this regulation is fully in effect and binding upon its effective date. No further regulatory action by the agency is necessary to make this rule effective. However, in order to benefit from comments that interested parties and the public may have, the agency is requesting that comments be submitted to the docket for this notice.

Comments received in response to this notice, as well as continued interaction with interested parties, will be considered in making future changes to these programs. Following the close of the comment period, the agency will publish a notice responding to the comments and, if appropriate, the agency will amend the provisions of this rule.

For ease of reference, this IFR sets forth in full part 1300.

IX. Regulatory Analyses and Notices

A. Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 13563, and DOT Regulatory Policies and Procedures

NHTSA has considered the impact of this rulemaking action under Executive Order 12866, Executive Order 13563, and the Department of Transportation's regulatory policies and procedures. This rulemaking document was not reviewed under Executive Order 12866 or Executive Order 13563. This action establishes revised uniform procedures implementing State highway safety grant programs, as a result of enactment of the Fixing America's Surface Transportation Act (FAST Act). While this interim final rule (IFR) would establish minimum criteria for highway safety grants, most of the criteria are based on statute. NHTSA has no discretion over the grant amounts, and its implementation authority is limited and non-controversial. Therefore, this rulemaking has been determined to be not "significant" under the Department of Transportation's regulatory policies and procedures and the policies of the Office of Management and Budget.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) of 1980 (5 U.S.C. 601 *et seq.*) requires agencies to evaluate the potential effects of their proposed and final rules on small businesses, small organizations, and small governmental jurisdictions. Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities. The Small Business Regulatory Enforcement Fairness Act (SBREFA) amended the RFA to require Federal agencies to provide a statement of the factual basis for certifying that an action would not have a significant economic impact on a substantial number of small entities.

This IFR is a rulemaking that will establish revised uniform procedures implementing State highway safety grant programs, as a result of enactment of the Fixing America's Surface Transportation Act (FAST Act). Under these grant programs, States will receive funds if they meet the application and qualification requirements. These grant programs will affect only State governments, which are not considered to be small entities as that term is defined by the RFA. Therefore, I certify that this action will not have a significant impact on a substantial number of small entities and find that the preparation of a Regulatory Flexibility Analysis is unnecessary.

C. Executive Order 13132 (Federalism)

Executive Order 13132 on "Federalism" requires NHTSA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." 64 FR 43255 (August 10, 1999). "Policies that have federalism implications" are defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Executive Order 13132, an agency may not issue a regulation with Federalism implications that imposes substantial direct compliance costs and that is not required by statute unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments or the agency consults with State and local governments in the process of developing the proposed regulation. An agency also may not issue a regulation with Federalism implications that preempts a State law without consulting with State and local officials.

The agency has analyzed this rulemaking action in accordance with the principles and criteria set forth in Executive Order 13132, and has determined that this IFR would not have sufficient Federalism implications as defined in the order to warrant formal consultation with State and local officials or the preparation of a federalism summary impact statement. However, NHTSA continues to engage with State representatives regarding general implementation of the FAST Act, including these grant programs, and expects to continue these informal dialogues.

D. Executive Order 12988 (Civil Justice Reform)

Pursuant to Executive Order 12988 (61 FR 4729 (February 7, 1996)), "Civil Justice Reform," the agency has considered whether this proposed rule would have any retroactive effect. I conclude that it would not have any retroactive or preemptive effect, and judicial review of it may be obtained pursuant to 5 U.S.C. 702. That section does not require that a petition for reconsideration be filed prior to seeking judicial review. This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

E. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA), as implemented by the Office of Management and Budget (OMB) in 5 CFR part 1320, a person is not required to respond to a collection of information by a Federal agency unless the collection displays a valid OMB control number. The grant application requirements in this IFR are considered to be a collection of information subject to requirements of the PRA. Because the agency cannot reasonably comply with the submission time periods under the PRA and provide States sufficient time to apply for the grants to be awarded in fiscal year 2017, the agency is seeking emergency clearance for the information collection related to the fiscal year 2017 grant application process. The agency is proceeding under the regular PRA clearance process for the collection of information related to grants beginning with fiscal year 2018 grants. Accordingly, in compliance with the PRA, we announce that NHTSA is seeking comment on a new information collection for grant programs beginning with fiscal year 2018 grants.

Agency: National Highway Traffic Safety Administration (NHTSA).

Title: State Highway Safety Grant Programs.

Type of Request: New collection.

OMB Control Number: Not assigned.

Form Number: N/A (Highway Safety Plan and Annual Plan).

Requested Expiration Date of Approval: Three years from the approval date.

Summary of Collection of Information: On December 4, 2015, the President signed into law the Fixing America's Surface Transportation Act (FAST Act), Public Law 114–94, which reauthorized highway safety grant programs administered by NHTSA. Specifically, these grant programs include the Highway Safety Program grants (23 U.S.C. 402 or Section 402), the National Priority Safety Program grants (23 U.S.C. 405 or Section 405) and a separate grant on racial profiling restored (with some changes) from a previous authorization (Sec. 1906, Pub. L. 109–59, as amended by Sec. 4011, Pub. L. 114–94, or Section 1906). The FAST Act requires NHTSA to award these grants to States pursuant to a rulemaking.

Unlike the prior authorization under MAP–21, the FAST Act does not significantly change the structure of these grant programs. The FAST Act instead made targeted amendments, adding more flexibility for States to qualify for some of the grants. For Section 402, the FAST Act made limited administrative changes and no substantive changes to the contents of the required Highway Safety Plan (HSP). For Section 405, the FAST Act made no substantive changes to four programs covering occupant protection grants, state traffic safety information systems improvements grants, impaired driving countermeasures grants and motorcyclist safety grants; made limited changes that added flexibility for States to qualify for three grant programs covering alcohol-ignition interlock law grants, distracted driving grants and state graduated driving licensing incentive grants; and created two new grant programs covering 24-7 sobriety programs grants and nonmotorized safety grants. For Section 1906, the FAST Act made changes that simplified the basis for States to receive a grant.

Consequently, for all of these grants, the agency continues to follow the process directed in MAP–21 establishing a consolidated application that uses the HSP States submit under the Section 402 program as a single application. The information required to be submitted for these grants includes the HSP consisting of information on the highway safety planning process, performance plan, highway safety countermeasure strategies and projects, performance report, certifications and assurances, and application materials that covers Section 405 grants and the reauthorized Section 1906 grant. In addition, States must submit an annual report evaluating the State's progress in achieving performance targets.

Under this IFR, the agency has taken significant steps to streamline the application process. This includes allowing States to more easily cross reference sections of their HSP under Section 402 where similar information is required to be submitted to qualify for a Section 405 grant and the introduction of a revised electronic submission process. As discussed above, in accordance with FAST Act requirements that require the agency to make greater use of an electronic application process, the agency intends to start using the Grants Management Solutions Suite (GMSS) for fiscal year 2018 grants. GMSS replaces the current grants tracking system and represents an enhanced and improved electronic system that will allow States to apply for and receive grants and also manage grants and invoicing electronically. The agency's approach will contribute overall to reducing the paperwork requirements associated with responding to the statutory requirements.

Description of the Need for the Information and Use of the Information: As noted above, the statute provides that the Highway Safety Plan is the application for the grants identified each fiscal year. This information is necessary to determine whether a State satisfies the criteria for grant awards. The annual report tracks progress in achieving the aims of the grant program. The information is necessary to verify performance under the grants and to provide a basis for improvement.

Description of the Likely Respondents: 57 (50 States, the District of Columbia, Puerto Rico, American Samoa, Guam, the Northern Mariana Islands, the U.S. Virgin Islands, and the Bureau of Indian Affairs on behalf of the Indian Country).

Estimate of the Total Annual Reporting and Recordkeeping Burden Resulting from the Collection of Information:

The Highway Safety Plan (HSP) is a planning document for a State's entire traffic safety program and outlines the countermeasure strategies, program activities, and funding for key program areas as identified by State and Federal data and problem identification. By statute, States must submit and NHTSA must approve the HSP as a condition of Section 402 grant funds. States also are required to submit their Sections 405 and 1906 grant applications as part of the HSP. States must submit the HSP each fiscal year in order to qualify for grant funds. In addition, States provide an annual report evaluating their progress under the programs.

The estimated burden hours for the collection of information are based on all eligible respondents for each of the grants:

- *Section 402 grants:* 57 (fifty States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Secretary of the Interior);
- *Section 405 Grants (except Motorcyclist Safety Grants) and Section 1906 Grant:* 56 (fifty States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands); and
- *Section 405, Motorcyclist Safety Grants:* 52 (fifty States, the District of Columbia, and Puerto Rico).

We estimate that it will take each respondent approximately 240 hours to collect, review and submit the required information to NHTSA for the Section 402 program. We further estimate that it will take each respondent approximately 180 hours to collect, review and submit the required information to NHTSA for the Section 405 program. Based on the above information, the estimated annual burden hours for all respondents are 23,760 hours.

Assuming the average salary of individuals responsible for submitting the information is $50.00 per hour, the estimated cost for each respondent is $21,000; the estimated total cost for all respondents is $1,197,000. These estimates are based on every eligible respondent submitting the required information for every available grant every year. However, all States do not apply for and receive a grant each year under each of these programs. Similarly, under Section 405 grants, some requirements allow States to submit a single application covering multiple years allowing States to simply recertify in subsequent years. Considering the agency's steps to streamline the current submission process under this IFR and the greater use of an electronic submission process beginning in fiscal year 2018, these estimates represent the highest possible burden hours and amounts possible for States submitting the required information.

Comments are invited on:

- Whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility.
- Whether the Agency's estimate for the burden of the information collection is accurate.
- Ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Please submit any comments, identified by the docket number in the heading of this document, by any of the methods described in the **ADDRESSES** section of this document. Comments are due by October 31, 2016.

F. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in expenditures by State, local or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually (adjusted annually for inflation with base year of 1995). This IFR would not meet the definition of a Federal mandate because the resulting annual State expenditures would not exceed the minimum threshold. The program is voluntary and States that choose to apply and qualify would receive grant funds.

G. National Environmental Policy Act

NHTSA has considered the impacts of this rulemaking action for the purposes of the National Environmental Policy Act. The agency has determined that this IFR would not have a significant impact on the quality of the human environment.

H. Executive Order 13211

Executive Order 13211 (66 FR 28355, May 18, 2001) applies to any rulemaking that: (1) Is determined to be economically significant as defined under Executive Order 12866, and is likely to have a significantly adverse effect on the supply of, distribution of, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. This rulemaking is not likely to have a significantly adverse effect on the supply of, distribution of, or use of energy. This rulemaking has not been designated as a significant energy action. Accordingly, this rulemaking is not subject to Executive Order 13211.

K. Executive Order 13175 (Consultation and Coordination With Indian Tribes)

The agency has analyzed this IFR under Executive Order 13175, and has determined that today's action would not have a substantial direct effect on one or more Indian tribes, would not impose substantial direct compliance costs on Indian tribal governments, and would not preempt tribal law. Therefore, a tribal summary impact statement is not required.

L. Plain Language

Executive Order 12866 and the President's memorandum of June 1, 1998, require each agency to write all rules in plain language. Application of the principles of plain language includes consideration of the following questions:

- Have we organized the material to suit the public's needs?
- Are the requirements in the rule clearly stated?
- Does the rule contain technical language or jargon that isn't clear?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the rule easier to understand?
- Would more (but shorter) sections be better?
- Could we improve clarity by adding tables, lists, or diagrams?
- What else could we do to make the rule easier to understand?

If you have any responses to these questions, please include them in your comments on this IFR.

M. Regulatory Identifier Number (RIN)

The Department of Transportation assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulations. The FAST Act requires NHTSA to award highway safety grants pursuant to rulemaking. (Section 4001(d), FAST Act) The Regulatory Information Service Center publishes the Unified Agenda in or about April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda.

N. Privacy Act

Please note that anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000

(65 FR19477) or you may visit *http://dms.dot.gov.*

X. Public Participation

How do I prepare and submit comments?

Your comments must be written and in English. To ensure that your comments are correctly filed in the Docket, please include the docket number of this document in your comments.

Your comments must not be more than 15 pages long. (49 CFR 553.21). We established this limit to encourage you to write your primary comments in a concise fashion. However, you may attach necessary additional documents to your comments. There is no limit on the length of the attachments.

Comments may also be submitted to the docket electronically by logging onto the Docket Management System Web site at *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Please note that pursuant to the Data Quality Act, in order for substantive data to be relied upon and used by the agency, it must meet the information quality standards set forth in the OMB and DOT Data Quality Act guidelines. Accordingly, we encourage you to consult the guidelines in preparing your comments. OMB's guidelines may be accessed at *http://www.whitehouse.gov/omb/fedreg/reproducible.html.*

How can I be sure that my comments were received?

If you wish Docket Management to notify you upon its receipt of your comments, enclose a self-addressed, stamped postcard in the envelope containing your comments. Upon receiving your comments, Docket Management will return the postcard by mail.

How do I submit confidential business information?

If you wish to submit any information under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Chief Counsel, NHTSA, at the address given above under **FOR FURTHER INFORMATION CONTACT**. In addition, you should submit a copy, from which you have deleted the claimed confidential business information, to the docket at the address given above under **ADDRESSES**. When you send a comment containing information claimed to be confidential business information, you should include a cover letter setting forth the information specified in our confidential business information regulation. (49 CFR part 512.)

Will the agency consider late comments?

We will consider all comments received before the close of business on the comment closing date indicated above under **DATES**. To the extent possible, we will also consider comments that the docket receives after that date. If the docket receives a comment too late for us to consider in developing a final rule (assuming that one is issued), we will consider that comment as an informal suggestion for future rulemaking action.

How can I read the comments submitted by other people?

You may read the comments received by the docket at the address given above under **ADDRESSES**. The hours of the docket are indicated above in the same location. You may also see the comments on the Internet. To read the comments on the Internet, go to *http://www.regulations.gov.* Follow the online instructions for accessing the dockets.

Please note that even after the comment closing date, we will continue to file relevant information in the docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically check the Docket for new material. You can arrange with the docket to be notified when others file comments in the docket. See *www.regulations.gov* for more information.

List of Subjects in 23 CFR Part 1300

Grant programs—Transportation, Highway safety, Intergovernmental relations, Reporting and recordkeeping requirements, Administrative practice and procedure, Alcohol abuse, Drug abuse, Motor vehicles—motorcycles.

For the reasons discussed in the preamble, under the authority of 23 U.S.C. 401 *et seq.*, the National Highway Traffic Safety Administration amends 23 CFR Chapter III by adding part 1300 to read as follows:

PART 1300—UNIFORM PROCEDURES FOR STATE HIGHWAY SAFETY GRANT PROGRAMS

Subpart A—General

Sec.
1300.1 Purpose.
1300.2 [Reserved].
1300.3 Definitions.
1300.4 State Highway Safety Agency—authority and functions.
1300.5 Due dates—interpretation.

Subpart B—Highway Safety Plan

1300.10 General.
1300.11 Contents.
1300.12 Due date for submission.
1300.13 Special funding conditions for Section 402 Grants.
1300.14 Review and approval procedures.
1300.15 Apportionment and obligation of Federal funds.

Subpart C—National Priority Safety Program and Racial Profiling Data Collection Grants

1300.20 General.
1300.21 Occupant protection grants.
1300.22 State traffic safety information system improvements grants.
1300.23 Impaired driving countermeasures grants.
1300.24 Distracted driving grants.
1300.25 Motorcyclist safety grants.
1300.26 State graduated driver licensing incentive grants.
1300.27 Nonmotorized safety grants.
1300.28 Racial profiling data collection grants.

Subpart D—Administration of the Highway Safety Grants

1300.30 General.
1300.31 Equipment.
1300.32 Amendments to Highway Safety Plans—approval by the Regional Administrator.
1300.33 Vouchers and project greements.
1300.34 [Reserved].
1300.35 Annual report.
1300.36 Appeals of written decision by the Regional Administrator.

Subpart E—Annual Reconciliation

1300.40 Expiration of the Highway Safety Plan.
1300.41 Disposition of unexpended balances.
1300.42 Post-grant adjustments.
1300.43 Continuing requirements.

Subpart F—Non-Compliance

1300.50 General.
1300.51 Sanctions—reduction of apportionment.
1300.52 Sanctions—risk assessment and non-compliance.

Subpart G—Special Provisions for Fiscal Year 2017 Highway Safety Grants

1300.60 Fiscal Year 2017 grant applications.
1300.61 Fiscal Year 2017 grants—general and administrative provisions.
Appendix A to Part 1300—Certifications and Assurances for Highway Safety Grants (23 U.S.C. Chapter 4; Sec. 1906, Pub. L. 109–59, as amended by Sec. 4011, Pub. L. 114–94).
Appendix B to Part 1300—Application Requirements for Section 405 and Section 1906 Grants.
Appendix C to Part 1300—Participation by Political Subdivisions.
Appendix D to Part 1300—Planning and Administration (P&A) Costs.

Authority: 23 U.S.C. 402; 23 U.S.C. 405; Sec. 1906, Pub. L. 109–59, 119 Stat. 1468, as amended by Sec. 4011, Pub. L. 114–94, 129

Stat. 1512; delegation of authority at 49 CFR 1.95.

Subpart A—General

§ 1300.1 Purpose.

This part establishes uniform procedures for State highway safety programs authorized under 23 U.S.C. Chapter 4 and Sec. 1906, Public Law 109–59, as amended by Sec. 4011, Public Law 114–94.

§ 1300.2 [Reserved].

§ 1300.3 Definitions.

As used in this part—

Annual Report File (ARF) means FARS data that are published annually, but prior to final FARS data.

Carry-forward funds means those funds that a State has not expended on projects in the fiscal year in which they were apportioned or allocated, that are within the period of availability, and that are being brought forward and made available for expenditure in a subsequent fiscal year.

Contract authority means the statutory language that authorizes an agency to incur an obligation without the need for a prior appropriation or further action from Congress and which, when exercised, creates a binding obligation on the United States for which Congress must make subsequent liquidating appropriations.

Countermeasure strategy means a proven effective countermeasure proposed or implemented with grant funds under 23 U.S.C. Chapter 4 and Section 1906 to address identified problems and meet performance targets. Examples include high visibility occupant protection enforcement, DUI courts, or alcohol screening and brief intervention programs.

Data-driven means informed by a systematic review and analysis of quality data sources when making decisions related to planning, target establishment, resource allocation and implementation.

Evidence-based means based on approaches that are proven effective with consistent results when making decisions related to countermeasure strategies and projects.

Fatality Analysis Reporting System (FARS) means the nationwide census providing public yearly data regarding fatal injuries suffered in motor vehicle traffic crashes, as published by NHTSA.

Fatality rate means the ratio of the number of fatalities (as defined in this section) to the number of vehicle miles traveled (VMT) (expressed in 100 million VMT) in a calendar year, based on the data reported by the FARS database.

Final FARS means the FARS data that replace the annual report file and contain additional cases or updates that became available after the annual report file was released.

Fiscal year means the Federal fiscal year, consisting of the 12 months beginning each October 1 and ending the following September 30.

Five-year (5-year) rolling average means the average of five individual points of data from five consecutive calendar years (*e.g.,* the 5-year rolling average of the annual fatality rate).

Governor means the Governor of any of the fifty States, Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands, the Mayor of the District of Columbia, or, for the application of this part to Indian Country as provided in 23 U.S.C. 402(h), the Secretary of the Interior.

Governor's Representative for Highway Safety means the official appointed by the Governor to implement the State's highway safety program or, for the application of this part to Indian Country as provided in 23 U.S.C. 402(h), an official of the Bureau of Indian Affairs or other Department of Interior official who is duly designated by the Secretary of the Interior to implement the Indian highway safety program.

Highway Safety Plan (HSP) means the document that the State submits each fiscal year as its application for highway safety grants, which describes the State's performance targets, the strategies and projects the State plans to implement, and the resources from all sources the State plans to use to achieve its highway safety performance targets.

Highway safety program means the planning, strategies and performance measures, and general oversight and management of highway safety strategies and projects by the State either directly or through sub-recipients to address highway safety problems in the State, as defined in the annual Highway Safety Plan and any amendments.

NHTSA means the National Highway Traffic Safety Administration.

Number of fatalities means the total number of persons suffering fatal injuries in a motor vehicle traffic crash during a calendar year, based on data reported in the FARS database.

Number of serious injuries means the total number of persons suffering at least one serious injury for each separate motor vehicle traffic crash during a calendar year, as reported by the State, where the crash involves a motor vehicle traveling on a public road.

Performance measure means a metric that is used to establish targets and to assess progress toward meeting the established targets.

Performance target means a quantifiable level of performance or a goal, expressed as a value, to be achieved within a specified time period.

Problem identification means the data collection and analysis process for identifying areas of the State, types of crashes, or types of populations (*e.g.,* high-risk populations) that present specific safety challenges to efforts to improve a specific program area.

Program area means any of the national priority safety program areas identified in 23 U.S.C. 405 or a program area identified by a State in the highway safety plan as encompassing a major highway safety problem in the State and for which documented effective countermeasure strategies have been identified or projected by analysis to be effective.

Project means a specific undertaking or activity proposed or implemented with grant funds under 23 U.S.C. Chapter 4 and Section 1906 and that addresses countermeasure strategies identified in the HSP.

Project agreement means a written agreement at the State level or between the State and a subrecipient or contractor under which the State agrees to perform a project or to provide Federal funds in exchange for the subrecipient's or contractor's performance of a project that supports the highway safety program.

Project number means a unique identifier assigned to each project agreement in the Highway Safety Plan.

Public road means any road under the jurisdiction of and maintained by a public authority and open to public travel.

Section 402 means section 402 of title 23 of the United States Code.

Section 405 means section 405 of title 23 of the United States Code.

Section 1906 means Sec. 1906, Public Law 109–59, as amended by Sec. 4011, Public Law 114–94.

Serious injuries means, until April 15, 2019, injuries classified as "A" on the KABCO scale through the use of the conversion tables developed by NHTSA, and thereafter, "suspected serious injury (A)" as defined in the Model Minimum Uniform Crash Criteria (MMUCC) Guideline, 4th Edition.

State means, except as provided in § 1300.25(b), any of the fifty States of the United States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, or, for the application of this part to Indian Country as provided in 23 U.S.C. 402(h), the Secretary of the Interior.

State highway safety improvement program (HSIP) means the program defined in 23 U.S.C. 148(a)(10).

State strategic highway safety plan (SHSP) means the plan defined in 23 U.S.C. 148(a)(11).

§ 1300.4 State Highway Safety Agency—authority and functions.

(a) *In general.* In order for a State to receive grant funds under this part, the Governor shall exercise responsibility for the highway safety program by appointing a Governor's Representative for Highway Safety who shall be responsible for a State Highway Safety Agency that has adequate powers and is suitably equipped and organized to carry out the State's highway safety program.

(b) *Authority.* Each State Highway Safety Agency shall be authorized to—

(1) Develop and execute the Highway Safety Plan and highway safety program in the State;

(2) Manage Federal grant funds effectively and efficiently and in accordance with all Federal and State requirements;

(3) Obtain information about highway safety programs and projects administered by other State and local agencies;

(4) Maintain or have access to information contained in State highway safety data systems, including crash, citation or adjudication, emergency medical services/injury surveillance, roadway and vehicle record keeping systems, and driver license data;

(5) Periodically review and comment to the Governor on the effectiveness of programs to improve highway safety in the State from all funding sources that the State plans to use for such purposes;

(6) Provide financial and technical assistance to other State agencies and political subdivisions to develop and carry out highway safety strategies and projects; and

(7) Establish and maintain adequate staffing to effectively plan, manage, and provide oversight of projects approved in the HSP and to properly administer the expenditure of Federal grant funds.

(c) *Functions.* Each State Highway Safety Agency shall—

(1) Develop and prepare the HSP based on evaluation of highway safety data, including crash fatalities and injuries, roadway, driver and other data sources to identify safety problems within the State;

(2) Establish projects to be funded within the State under 23 U.S.C. Chapter 4 based on identified safety problems and priorities and projects under Section 1906;

(3) Conduct a risk assessment of subrecipients and monitor subrecipients based on risk, as provided in 2 CFR 200.331;

(4) Provide direction, information and assistance to subrecipients concerning highway safety grants, procedures for participation, development of projects and applicable Federal and State regulations and policies;

(5) Encourage and assist subrecipients to improve their highway safety planning and administration efforts;

(6) Review and approve, and evaluate the implementation and effectiveness of, State and local highway safety programs and projects from all funding sources that the State plans to use under the HSP, and approve and monitor the expenditure of grant funds awarded under 23 U.S.C. Chapter 4 and Section 1906;

(7) Assess program performance through analysis of highway safety data and data-driven performance measures;

(8) Ensure that the State highway safety program meets the requirements of 23 U.S.C. Chapter 4, Section 1906 and applicable Federal and State laws, including but not limited to the standards for financial management systems required under 2 CFR 200.302 and internal controls required under 2 CFR 200.303;

(9) Ensure that all legally required audits of the financial operations of the State Highway Safety Agency and of the use of highway safety grant funds are conducted;

(10) Track and maintain current knowledge of changes in State statutes or regulations that could affect State qualification for highway safety grants or transfer programs;

(11) Coordinate the HSP and highway safety data collection and information systems activities with other federally and non-federally supported programs relating to or affecting highway safety, including the State strategic highway safety plan as defined in 23 U.S.C. 148(a); and

(12) Administer Federal grant funds in accordance with Federal and State requirements, including 2 CFR parts 200 and 1201.

§ 1300.5 Due dates—interpretation.

If any deadline or due date in this part falls on a Saturday, Sunday or Federal holiday, the applicable deadline or due date shall be the next business day.

Subpart B—Highway Safety Plan

§ 1300.10 General.

To apply for any highway safety grant under 23 U.S.C. Chapter 4 and Section 1906, a State shall submit electronically a Highway Safety Plan meeting the requirements of this subpart.

§ 1300.11 Contents.

The State's Highway Safety Plan documents a State's highway safety program that is data-driven in establishing performance targets and selecting the countermeasure strategies and projects to meet performance targets. Each fiscal year, the State's HSP shall consist of the following components:

(a) *Highway safety planning process.* (1) Description of the data sources and processes used by the State to identify its highway safety problems, describe its highway safety performance measures, establish its performance targets, and develop and select evidence-based countermeasure strategies and projects to address its problems and achieve its performance targets;

(2) Identification of the participants in the processes (*e.g.*, highway safety committees, program stakeholders, community and constituent groups);

(3) Description and analysis of the State's overall highway safety problems as identified through an analysis of data, including but not limited to fatality, injury, enforcement, and judicial data, to be used as a basis for setting performance targets and developing countermeasure strategies.

(4) Discussion of the methods for project selection (*e.g.*, constituent outreach, public meetings, solicitation of proposals);

(5) List of information and data sources consulted; and

(6) Description of the outcomes from the coordination of the HSP, data collection, and information systems with the State SHSP.

(b) *Performance report.* A program-area-level report on the State's progress towards meeting State performance targets from the previous fiscal year's HSP, and a description of how the State will adjust its upcoming HSP to better meet performance targets if a State has not met its performance targets.

(c) *Performance plan.* (1) List of quantifiable and measurable highway safety performance targets that are data-driven, consistent with the Uniform Guidelines for Highway Safety Program and based on highway safety problems identified by the State during the planning process conducted under paragraph (a) of this section.

(2) All performance measures developed by NHTSA in collaboration with the Governors Highway Safety Association ("Traffic Safety Performance Measures for States and Federal Agencies" (DOT HS 811 025)),

as revised in accordance with 23 U.S.C. 402(k)(5) and published in the **Federal Register**, which must be used as minimum measures in developing the performance targets identified in paragraph (c)(1) of this section, provided that—

(i) At least one performance measure and performance target that is data-driven shall be provided for each program area that enables the State to track progress toward meeting the quantifiable annual target;

(ii) For each program area performance measure, the State shall provide—

(A) Documentation of current safety levels (baseline) calculated based on a 5-year rolling average for common performance measures in the HSP and HSIP, as provided in paragraph (c)(2)(iii) of this section;

(B) Quantifiable performance targets; and

(C) Justification for each performance target that explains how the target is data-driven, including a discussion of the factors that influenced the performance target selection; and

(iii) State HSP performance targets are identical to the State DOT targets for common performance measures (fatality, fatality rate, and serious injuries) reported in the HSIP annual report, as coordinated through the State SHSP. These performance measures shall be based on a 5-year rolling average that is calculated by adding the number of fatalities or number of serious injuries as it pertains to the performance measure for the most recent 5 consecutive calendar years ending in the year for which the targets are established. The ARF may be used, but only if final FARS is not yet available. The sum of the fatalities or sum of serious injuries is divided by five and then rounded to the tenth decimal place for fatality or serious injury numbers and rounded to the thousandth decimal place for fatality rates.

(3) Additional performance measures not included under paragraph (c)(2) of this section. For program areas where performance measures have not been jointly developed (*e.g.*, distracted driving, drug-impaired driving) for which States are using HSP funds, the State shall develop its own performance measures and performance targets that are data-driven, and shall provide the same information as required under paragraph (c)(2) of this section.

(d) *Highway safety program area problem identification, countermeasure strategies, projects and funding.* (1) Description of each program area countermeasure strategy that will help the State complete its program and achieve specific performance targets described in paragraph (c) of this section, including, at a minimum—

(i) An assessment of the overall projected traffic safety impacts of the countermeasure strategies chosen and of the proposed or approved projects to be funded; and

(ii) A description of the linkage between program area problem identification data, performance targets, identified countermeasure strategies and allocation of funds to projects.

(2) Description of each project within the countermeasure strategies in paragraph (d)(1) of this section that the State plans to implement to reach the performance targets identified in paragraph (c) of this section, including, at a minimum—

(i) A list and description of the projects that the State will conduct to support the countermeasure strategies within each program area to address its problems and achieve its performance targets; and

(ii) For each project, identification of the project name and description, sub-recipient, funding sources, funding amounts, amount for match, indirect cost, local benefit and maintenance of effort (as applicable), project number, and program funding code.

(3) Data and data analysis or other documentation consulted that support the effectiveness of proposed countermeasure strategies and support the selection of and funding allocation for the proposed projects described in paragraph (d)(2) of this section (*e.g.*, program assessment recommendations, participation in national mobilizations, emerging issues). The State may also include information on the cost effectiveness of proposed countermeasure strategies, if such information is available.

(4) For innovative countermeasure strategies (*i.e.*, countermeasure strategies that are not evidence-based), justification supporting the countermeasure strategy.

(5) Evidence-based traffic safety enforcement program (TSEP) to prevent traffic violations, crashes, and crash fatalities and injuries in areas most at risk for such incidents, provided that—

(i) The State shall identify the projects that collectively constitute a data-driven TSEP and include—

(A) An analysis of crashes, crash fatalities, and injuries in areas of highest risk; and

(B) An explanation of the deployment of resources based on that analysis.

(ii) The State shall describe how it plans to monitor the effectiveness of enforcement activities, make ongoing adjustments as warranted by data, and update the countermeasure strategies and projects in the HSP, as applicable, in accordance with this part.

(6) The planned high-visibility enforcement (HVE) strategies to support national mobilizations. The State shall implement activities in support of national highway safety goals to reduce motor vehicle related fatalities that also reflect the primary data-related crash factors within the State, as identified by the State highway safety planning process, including:

(i) Participation in the National high-visibility law enforcement mobilizations in accordance with 23 U.S.C. 404. The planned high-visibility enforcement strategies to support the national mobilizations shall include not less than three mobilization campaigns in each fiscal year to reduce alcohol-impaired or drug-impaired operation of motor vehicles and increase use of seatbelts by occupants of motor vehicles; and

(ii) Submission of information regarding mobilization participation (*e.g.*, participating and reporting agencies, enforcement activity, citation information, paid and earned media information) to NHTSA.

(e) *Teen Traffic Safety Program.* If the State elects to include the Teen Traffic Safety Program authorized under 23 U.S.C. 402(m), a description of projects, including the amount and types of Federal funding requested, the State match, planning and administration costs, local benefit as applicable, appropriate use of fund codes, and applicable performance target that the State will conduct as part of the Teen Traffic Safety Program—a Statewide program to improve traffic safety for teen drivers. Projects must meet the eligible use requirements of 23 U.S.C. 402(m)(2).

(f) *Section 405 grant and racial profiling data collection grant application.* Application for any of the national priority safety program grants and the racial profiling data collection grant, in accordance with the requirements of subpart C and as provided in Appendix B, signed by the Governor's Representative for Highway Safety.

(g) *Certifications and assurances.* The Certifications and Assurances for 23 U.S.C. Chapter 4 and Section 1906 grants contained in appendix A, signed by the Governor's Representative for Highway Safety, certifying to the HSP application contents and performance conditions and providing assurances that the State will comply with applicable laws, and financial and programmatic requirements.

§ 1300.12 Due date for submission.

(a) A State shall submit its Highway Safety Plan electronically to NHTSA no later than 11:59 p.m. EDT on July 1 preceding the fiscal year to which the HSP applies.

(b) Failure to meet this deadline may result in delayed approval and funding of a State's Section 402 grant or disqualification from receiving Section 405 or racial profiling data collection grants.

§ 1300.13 Special funding conditions for Section 402 Grants.

The State's highway safety program under Section 402 shall be subject to the following conditions, and approval under § 1300.14 of this part shall be deemed to incorporate these conditions:

(a) *Planning and administration costs.* (1) Federal participation in P&A activities shall not exceed 50 percent of the total cost of such activities, or the applicable sliding scale rate in accordance with 23 U.S.C. 120. The Federal contribution for P&A activities shall not exceed 13 percent of the total funds the State receives under Section 402. In accordance with 23 U.S.C. 120(i), the Federal share payable for projects in the U.S. Virgin Islands, Guam, American Samoa and the Commonwealth of the Northern Mariana Islands shall be 100 percent. The Indian Country, as defined by 23 U.S.C. 402(h), is exempt from the provisions of P&A requirements. NHTSA funds shall be used only to fund P&A activities attributable to NHTSA programs. Determinations of P&A shall be in accordance with the provisions of Appendix D.

(2) P&A tasks and related costs shall be described in the P&A module of the State's Highway Safety Plan. The State's matching share shall be determined on the basis of the total P&A costs in the module.

(b) *Prohibition on use of grant funds to check for helmet usage.* Grant funds under this part shall not be used for programs to check helmet usage or to create checkpoints that specifically target motorcyclists.

(c) *Prohibition on use of grant funds for automated traffic enforcement systems.* The State may not expend funds apportioned to the State under Section 402 to carry out a program to purchase, operate, or maintain an automated traffic enforcement system. The term "automated traffic enforcement system" includes any camera that captures an image of a vehicle for the purposes only of red light and speed enforcement, and does not include hand held radar and other devices operated by law enforcement officers to make an on-the-scene traffic stop, issue a traffic citation, or other enforcement action at the time of the violation.

(d) *Biennial survey of State automated traffic enforcement systems requirement.* (1) Beginning with fiscal year 2018 highway safety plans and biennially thereafter, the State must either—

(i) Certify, as provided in Appendix A, that automated traffic enforcement systems are not used on any public road in the State; or

(ii)(A) Conduct a survey during the fiscal year of the grant meeting the requirements of paragraph (d)(2) of this section and provide assurances, as provided in Appendix A, that it will do so; and

(B) Submit the survey results to the NHTSA Regional office no later than March 1 of the fiscal year of the grant.

(2) *Survey contents.* The survey shall include information about all automated traffic enforcement systems installed in the State, including systems installed in political subdivisions. The survey shall include:

(i) List of automated traffic enforcement systems in the State;

(ii) Adequate data to measure the transparency, accountability, and safety attributes of each automated traffic enforcement system; and

(iii) Comparison of each automated traffic enforcement system with—

(A) "Speed Enforcement Camera Systems Operational Guidelines" (DOT HS 810 916), as updated; and

(B) "Red Light Camera Systems Operational Guidelines" (FHWA–SA–05–002), as updated.

§ 1300.14 Review and approval procedures.

(a) *General.* Upon receipt and initial review of the Highway Safety Plan, NHTSA may request additional information from a State to ensure compliance with the requirements of this part. Failure to respond promptly to a request for additional information concerning the Section 402 grant application may result in delayed approval and funding of a State's Section 402 grant. Failure to respond promptly to a request for additional information concerning any of the Section 405 or Section 1906 grant applications may result in a State's disqualification from consideration for a Section 405 or Section 1906 grant.

(b) *Approval or disapproval of Highway Safety Plan.* Within 45 days after receipt of the HSP under this subpart—

(1) For Section 402 grants, the Regional Administrator shall issue—

(i) A letter of approval, with conditions, if any, to the Governor's Representative for Highway Safety; or

(ii) A letter of disapproval to the Governor's Representative for Highway Safety informing the State of the reasons for disapproval and requiring resubmission of the HSP with proposed revisions necessary for approval.

(2) For Section 405 and Section 1906 grants, the NHTSA Administrator shall notify States in writing of Section 405 and Section 1906 grant awards and specify any conditions or limitations imposed by law on the use of funds.

(c) *Resubmission of disapproved Highway Safety Plan.* The Regional Administrator shall issue a letter of approval or disapproval within 30 days after receipt of a revised HSP resubmitted as provided in paragraph (b)(1)(ii) of this section.

§ 1300.15 Apportionment and obligation of Federal funds.

(a) Except as provided in paragraph (b) of this section, on October 1 of each fiscal year, or soon thereafter, the NHTSA Administrator shall, in writing, distribute funds available for obligation under 23 U.S.C. Chapter 4 and Section 1906 to the States and specify any conditions or limitations imposed by law on the use of the funds.

(b) In the event that authorizations exist but no applicable appropriation act has been enacted by October 1 of a fiscal year, the NHTSA Administrator may, in writing, distribute a part of the funds authorized under 23 U.S.C. Chapter 4 and Section 1906 contract authority to the States to ensure program continuity, and in that event shall specify any conditions or limitations imposed by law on the use of the funds. Upon appropriation of grant funds, the NHTSA Administrator shall, in writing, promptly adjust the obligation limitation and specify any conditions or limitations imposed by law on the use of the funds.

(c) Funds distributed under paragraph (a) or (b) of this section shall be available for expenditure by the States to satisfy the Federal share of expenses under the approved Highway Safety Plan, and shall constitute a contractual obligation of the Federal Government, subject to any conditions or limitations identified in the distributing document. Such funds shall be available for expenditure by the States as provided in § 1300.41(b), after which the funds shall lapse.

(d) Notwithstanding the provisions of paragraph (c) of this section, reimbursement of State expenses or advance payment of 23 U.S.C. Chapter 4 and Section 1906 funds shall be contingent upon the State's submission of up-to-date and approved projects in the HSP, in accordance with §§ 1300.11(d) and 1300.32.

Subpart C—National Priority Safety Program and Racial Profiling Data Collection Grants

§ 1300.20 General.

(a) *Scope.* This subpart establishes criteria, in accordance with Section 405 for awarding grants to States that adopt and implement programs and statutes to address national priorities for reducing highway deaths and injuries, and in accordance with Section 1906, for awarding grants to States that maintain and allow public inspection of race and ethnic information on motor vehicle stops.

(b) *Definitions.* As used in this subpart—

Blood alcohol concentration or *BAC* means grams of alcohol per deciliter or 100 milliliters blood, or grams of alcohol per 210 liters of breath.

Majority means greater than 50 percent.

Passenger motor vehicle means a passenger car, pickup truck, van, minivan or sport utility vehicle with a gross vehicle weight rating of less than 10,000 pounds.

Personal wireless communications device means a device through which personal wireless services (commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services) are transmitted, but does not include a global navigation satellite system receiver used for positioning, emergency notification, or navigation purposes.

Primary offense means an offense for which a law enforcement officer may stop a vehicle and issue a citation in the absence of evidence of another offense.

(c) *Eligibility and application*—(1) *Eligibility.* Except as provided in § 1300.25(c), the 50 States, the District of Columbia, Puerto Rico, American Samoa, the Commonwealth of the Northern Mariana Islands, Guam and the U.S. Virgin Islands are each eligible to apply for grants identified under this subpart.

(2) *Application.* (i) For all grants under Section 405 and Section 1906, the Governor's Representative for Highway Safety, on behalf of the State, shall sign and submit with the Highway Safety Plan, the information required under Appendix B—Application Requirements for Section 405 and Section 1906 Grants.

(ii) For all grant applications under Section 405 and Section 1906, if the State is relying on specific elements of the HSP as part of its application materials for grants under this subpart, the State shall include the specific page numbers in the HSP.

(d) *Qualification based on State statutes.* Whenever a qualifying State statute is the basis for a grant awarded under this subpart, such statute shall have been enacted by the application due date and be in effect and enforced, without interruption, by the beginning of and throughout the fiscal year of the grant award.

(e) *Award determinations and transfer of funds.* (1) Except as provided in § 1300.26(g), the amount of a grant awarded to a State in a fiscal year under Section 405 and Section 1906 shall be in proportion to the amount each such State received under Section 402 for fiscal year 2009.

(2) Notwithstanding paragraph (e)(1) of this section, and except as provided in §§ 1300.25(k) and 1300.28(c)(2), a grant awarded to a State in a fiscal year under Section 405 may not exceed 10 percent of the total amount made available for that subsection for that fiscal year.

(3) Except for amounts made available for grants under § 1300.28, if it is determined after review of applications that funds for a grant program under Section 405 will not all be distributed, such funds shall be transferred to Section 402 and shall distributed in proportion to the amount each State received under Section 402 for fiscal year 2009 to ensure, to the maximum extent practicable, that each State receives the maximum funding for which it qualifies.

(f) *Matching.* (1) Except as provided in paragraph (f)(2) of this section, the Federal share of the costs of activities or programs funded with grants awarded under this subpart may not exceed 80 percent.

(2) The Federal share of the costs of activities or programs funded with grants awarded to the U.S. Virgin Islands, Guam, American Samoa and the Commonwealth of the Northern Mariana Islands shall be 100 percent.

§ 1300.21 Occupant protection grants.

(a) *Purpose.* This section establishes criteria, in accordance with 23 U.S.C. 405(b), for awarding grants to States that adopt and implement effective occupant protection programs to reduce highway deaths and injuries resulting from individuals riding unrestrained or in properly restrained in motor vehicles.

(b) *Definitions.* As used in this section—

Child restraint means any device (including a child safety seat, booster seat used in conjunction with 3-point belts, or harness, but excluding seat belts) that is designed for use in a motor vehicle to restrain, seat, or position a child who weighs 65 pounds (30 kilograms) or less and that meets the Federal motor vehicle safety standard prescribed by NHTSA for child restraints.

High seat belt use rate State means a State that has an observed seat belt use rate of 90.0 percent or higher (not rounded) based on validated data from the State survey of seat belt use conducted during the previous calendar year, in accordance with the Uniform Criteria for State Observational Surveys of Seat Belt Use, 23 CFR part 1340 (*e.g.,* for a grant application submitted on July 1, 2016, the "previous calendar year" would be 2015).

Lower seat belt use rate State means a State that has an observed seat belt use rate below 90.0 percent (not rounded) based on validated data from the State survey of seat belt use conducted during the previous calendar year, in accordance with the Uniform Criteria for State Observational Surveys of Seat Belt Use, 23 CFR part 1340 (*e.g.,* for a grant application submitted on July 1, 2016, the "previous calendar year" would be 2015).

Seat belt means, with respect to open-body motor vehicles, including convertibles, an occupant restraint system consisting of a lap belt or a lap belt and a detachable shoulder belt, and with respect to other motor vehicles, an occupant restraint system consisting of integrated lap and shoulder belts.

(c) *Eligibility determination.* A State is eligible to apply for a grant under this section as a high seat belt use rate State or as a lower seat belt use rate State, in accordance with paragraph (d) or (e) of this section, as applicable.

(d) *Qualification criteria for a high seat belt use rate State.* To qualify for an Occupant Protection Grant in a fiscal year, a high seat belt use rate State (as determined by NHTSA) shall submit as part of its HSP the following documentation, in accordance with Part 1 of Appendix B:

(1) *Occupant protection plan.* State occupant protection program area plan that identifies the safety problems to be addressed, performance measures and targets, and the countermeasure strategies and projects the State will implement to address those problems, at the level of detail required under § 1300.11(c) and (d).

(2) *Participation in Click-it-or-Ticket national mobilization.* Description of the State's planned participation in the Click it or Ticket national mobilization, including a list of participating

agencies, during the fiscal year of the grant, as required under § 1300.11(d)(6);

(3) *Child restraint inspection stations.* (i) Table in the HSP that documents an active network of child passenger safety inspection stations and/or inspection events, including:

(A) The total number of inspection stations/events in the State; and

(B) The total number of inspection stations and/or inspection events that service rural and urban areas and at-risk populations (*e.g.,* low income, minority); and

(ii) Certification, signed by the Governor's Representative for Highway Safety, that the inspection stations/events are staffed with at least one current nationally Certified Child Passenger Safety Technician.

(4) *Child passenger safety technicians.* Table in the HSP that identifies the number of classes to be held, location of classes, and estimated number of students needed to ensure coverage of child passenger safety inspection stations and inspection events by nationally Certified Child Passenger Safety Technicians.

(5) *Maintenance of effort.* The assurance in Part 1 of Appendix B that the lead State agency responsible for occupant protection programs shall maintain its aggregate expenditures for occupant protection programs at or above the average level of such expenditures in fiscal years 2014 and 2015.

(e) *Qualification criteria for a lower seat belt use rate State.* To qualify for an Occupant Protection Grant in a fiscal year, a lower seat belt use rate State (as determined by NHTSA) shall satisfy all the requirements of paragraph (d) of this section, and submit as part of its HSP documentation demonstrating that it meets at least three of the following additional criteria, in accordance with Part 1 of Appendix B:

(1) *Primary enforcement seat belt use statute.* The State shall provide legal citations to the State law demonstrating that the State has enacted and is enforcing occupant protection statutes that make a violation of the requirement to be secured in a seat belt or child restraint a primary offense.

(2) *Occupant protection statute.* The State shall provide legal citations to State law demonstrating that the State has enacted and is enforcing occupant protection statutes that:

(i) Require—

(A) Each occupant riding in a passenger motor vehicle who is under eight years of age, weighs less than 65 pounds and is less than four feet, nine inches in height to be secured in an age-appropriate child restraint;

(B) Each occupant riding in a passenger motor vehicle other than an occupant identified in paragraph (e)(2)(i)(A) of this section to be secured in a seat belt or age-appropriate child restraint;

(C) A minimum fine of $25 per unrestrained occupant for a violation of the occupant protection statutes described in paragraph (e)(2)(i) of this section.

(ii) Notwithstanding paragraph (e)(2)(i), permit no exception from coverage except for—

(A) Drivers, but not passengers, of postal, utility, and commercial vehicles that make frequent stops in the course of their business;

(B) Persons who are unable to wear a seat belt or child restraint because of a medical condition, provided there is written documentation from a physician;

(C) Persons who are unable to wear a seat belt or child restraint because all other seating positions are occupied by persons properly restrained in seat belts or child restraints;

(D) Emergency vehicle operators and passengers in emergency vehicles during an emergency;

(E) Persons riding in seating positions or vehicles not required by Federal Motor Vehicle Safety Standards to be equipped with seat belts; or

(F) Passengers in public and livery conveyances.

(3) *Seat belt enforcement.* The State shall identify the countermeasure strategies and projects demonstrating that the State conducts sustained enforcement (*i.e.,* a program of recurring efforts throughout the fiscal year of the grant to promote seat belt and child restraint enforcement), at the level of detail required under § 1300.11(d)(5), that based on the State's problem identification, involves law enforcement agencies responsible for seat belt enforcement in geographic areas in which at least 70 percent of the State's unrestrained passenger vehicle occupant fatalities occurred.

(4) *High risk population countermeasure programs.* The State shall identify the countermeasure strategies and projects, at the level of detail required under § 1300.11(d), demonstrating that the State will implement data-driven programs to improve seat belt and child restraint use for at least two of the following at-risk populations:

(i) Drivers on rural roadways;

(ii) Unrestrained nighttime drivers;

(iii) Teenage drivers;

(iv) Other high-risk populations identified in the occupant protection program area required under paragraph (d)(1) of this section.

(5) *Comprehensive occupant protection program.* The State shall submit the following:

(i) Date of NHTSA-facilitated program assessment that was conducted within five years prior to the application due date that evaluates the occupant protection program for elements designed to increase seat belt usage in the State;

(ii) Multi-year strategic plan based on input from Statewide stakeholders (task force) under which the State developed—

(A) *Data-driven performance targets* to improve occupant protection in the State, at the level of detail required under § 1300.11(c);

(B) *Countermeasure strategies* (such as enforcement, education, communication, policies/legislation, partnerships/outreach) designed to achieve the performance targets of the strategic plan, at the level of detail required under § 1300.11(d);

(C) *A program management strategy* that provides leadership and indicates who is responsible for implementing various aspects of the multi-year strategic plan; and

(D) *An enforcement strategy* that includes activities such as encouraging seat belt use policies for law enforcement agencies, vigorous enforcement of seat belt and child safety seat statutes, and accurate reporting of occupant protection system information on police accident report forms, at the level of detail required under § 1300.11(d)(5).

(iii) The name and title of the State's designated occupant protection coordinator responsible for managing the occupant protection program in the State, including developing the occupant protection program area of the HSP and overseeing the execution of the projects designated in the HSP; and

(iv) A list that contains the names, titles and organizations of the Statewide occupant protection task force membership that includes agencies and organizations that can help develop, implement, enforce and evaluate occupant protection programs.

(6) *Occupant protection program assessment.* The State shall identify the date of the NHTSA-facilitated assessment of all elements of its occupant protection program, which must have been conducted within three years prior to the application due date.

(f) *Use of grant funds*—(1) *Eligible uses.* Except as provided in paragraph (f)(2) of this section, a State may use grant funds awarded under 23 U.S.C.

405(b) for the following programs or purposes only:

(i) To support high-visibility enforcement mobilizations, including paid media that emphasizes publicity for the program, and law enforcement;

(ii) To train occupant protection safety professionals, police officers, fire and emergency medical personnel, educators, and parents concerning all aspects of the use of child restraints and occupant protection;

(iii) To educate the public concerning the proper use and installation of child restraints, including related equipment and information systems;

(iv) To provide community child passenger safety services, including programs about proper seating positions for children and how to reduce the improper use of child restraints;

(v) To establish and maintain information systems containing data about occupant protection, including the collection and administration of child passenger safety and occupant protection surveys; or

(vi) To purchase and distribute child restraints to low-income families, provided that not more than five percent of the funds received in a fiscal year are used for such purpose.

(2) *Special rule—high seat belt use rate States.* Notwithstanding paragraph (f)(1) of this section, a State that qualifies for grant funds as a high seat belt use rate State may elect to use up to 100 percent of grant funds awarded under this section for any eligible project or activity under Section 402.

§ 1300.22 State Traffic safety information system improvements grants.

(a) *Purpose.* This section establishes criteria, in accordance with 23 U.S.C. 405(c), for grants to States to develop and implement effective programs that improve the timeliness, accuracy, completeness, uniformity, integration, and accessibility of State safety data needed to identify priorities for Federal, State, and local highway and traffic safety programs; evaluate the effectiveness of such efforts; link State data systems, including traffic records and systems that contain medical, roadway, and economic data; improve the compatibility and interoperability of State data systems with national data systems and the data systems of other States; and enhance the agency's ability to observe and analyze national trends in crash occurrences, rates, outcomes, and circumstances.

(b) *Qualification criteria.* To qualify for a grant under this section in a fiscal year, a State shall submit as part of its HSP the following documentation, in accordance with part 2 of appendix B:

(1) *Traffic records coordinating committee (TRCC).* The State shall submit—

(i) At least three meeting dates of the TRCC during the 12 months immediately preceding the application due date;

(ii) Name and title of the State's Traffic Records Coordinator;

(iii) List of TRCC members by name, title, home organization and the core safety database represented, provided that at a minimum, at least one member represents each of the following core safety databases:

(A) Crash;

(B) Citation or adjudication;

(C) Driver;

(D) Emergency medical services or injury surveillance system;

(E) Roadway; and

(F) Vehicle.

(2) *State traffic records strategic plan.* The State shall submit a Strategic Plan, approved by the TRCC, that—

(i) Describes specific, quantifiable and measurable improvements, as described in paragraph (b)(3) of this section, that are anticipated in the State's core safety databases, including crash, citation or adjudication, driver, emergency medical services or injury surveillance system, roadway, and vehicle databases;

(ii) Includes a list of all recommendations from its most recent highway safety data and traffic records system assessment;

(iii) Identifies which recommendations described in paragraph (b)(2)(ii) of this section the State intends to address in the fiscal year, the projects in the HSP that implement each recommendation, and the performance measures to be used to demonstrate quantifiable and measurable progress; and

(iv) Identifies which recommendations described in paragraph (b)(2)(ii) of this section the State does not intend to address in the fiscal year and explains the reason for not implementing the recommendations.

(3) *Quantitative improvement.* The State shall demonstrate quantitative improvement in the data attribute of accuracy, completeness, timeliness, uniformity, accessibility or integration of a core database by providing—

(i) A written description of the performance measures that clearly identifies which performance attribute for which core database the State is relying on to demonstrate progress using the methodology set forth in the "Model Performance Measures for State Traffic Records Systems" (DOT HS 811 441), as updated; and

(ii) Supporting documentation covering a contiguous 12 month performance period starting no earlier than April 1 of the calendar year prior to the application due date that demonstrates quantitative improvement when compared to the comparable 12 month baseline period.

(4) *State highway safety data and traffic records system assessment.* The State shall identify the date of the assessment of the State's highway safety data and traffic records system that was conducted or updated within the five years prior to the application due date and that complies with the procedures and methodologies outlined in NHTSA's "Traffic Records Highway Safety Program Advisory" (DOT HS 811 644), as updated.

(c) *Requirement for maintenance of effort.* The State shall submit the assurance in part 2 of appendix B that the lead State agency responsible for State traffic safety information system improvements programs shall maintain its aggregate expenditures for State traffic safety information system improvements programs at or above the average level of such expenditures in fiscal years 2014 and 2015.

(d) *Use of grant funds.* A State may use grant funds awarded under 23 U.S.C. 405(c) to make quantifiable, measureable progress improvements in the accuracy, completeness, timeliness, uniformity, accessibility or integration of data in a core highway safety database.

§ 1300.23 Impaired driving countermeasures grants.

(a) *Purpose.* This section establishes criteria, in accordance with 23 U.S.C. 405(d), for awarding grants to States that adopt and implement effective programs to reduce traffic safety problems resulting from individuals driving motor vehicles while under the influence of alcohol, drugs, or the combination of alcohol and drugs; that enact alcohol-ignition interlock laws; or that implement 24–7 sobriety programs.

(b) *Definitions.* As used in this section—

24–7 sobriety program means a State law or program that authorizes a State court or an agency with jurisdiction, as a condition of bond, sentence, probation, parole, or work permit, to require an individual who was arrested for, pleads guilty to or was convicted of driving under the influence of alcohol or drugs to—

(i) Abstain totally from alcohol or drugs for a period of time; and

(ii) Be subject to testing for alcohol or drugs at least twice per day at a testing location, by continuous transdermal alcohol monitoring via an electronic monitoring device or by an alternative method approved by NHTSA.

Alcohol means wine, beer and distilled spirits.

Average impaired driving fatality rate means the number of fatalities in motor vehicle crashes involving a driver with a blood alcohol concentration of at least 0.08 percent for every 100,000,000 vehicle miles traveled, based on the most recently reported three calendar years of final data from the FARS.

Assessment means a NHTSA-facilitated process that employs a team of subject matter experts to conduct a comprehensive review of a specific highway safety program in a State.

Driving under the influence of alcohol, drugs, or a combination of alcohol and drugs means operating a vehicle while the alcohol and/or drug concentration in the blood or breath, as determined by chemical or other tests, equals or exceeds the level established by the State, or is equivalent to the standard offense, for driving under the influence of alcohol or drugs in the State.

Driving While Intoxicated (DWI) Court means a court that specializes in cases involving driving while intoxicated and abides by the Ten Guiding Principles of DWI Courts in effect on the date of the grant, as established by the National Center for DWI Courts.

Drugs means controlled substances, as that term is defined under section 102(6) of the Controlled Substances Act, 21 U.S.C. 802(6).

High-visibility enforcement efforts means participation in national impaired driving law enforcement campaigns organized by NHTSA, participation in impaired driving law enforcement campaigns organized by the State, or the use of sobriety checkpoints and/or saturation patrols conducted in a highly visible manner and supported by publicity through paid or earned media.

High-range State means a State that has an average impaired driving fatality rate of 0.60 or higher.

Low-range State means a State that has an average impaired driving fatality rate of 0.30 or lower.

Mid-range State means a State that has an average impaired driving fatality rate that is higher than 0.30 and lower than 0.60.

Restriction on driving privileges means any type of State-imposed limitation, such as a license revocation or suspension, location restriction, alcohol-ignition interlock device, or alcohol use prohibition.

Saturation patrol means a law enforcement activity during which enhanced levels of law enforcement are conducted in a concentrated geographic area (or areas) for the purpose of detecting drivers operating motor vehicles while impaired by alcohol and/or other drugs.

Sobriety checkpoint means a law enforcement activity during which law enforcement officials stop motor vehicles on a non-discriminatory, lawful basis for the purpose of determining whether the operators of such motor vehicles are driving while impaired by alcohol and/or other drugs.

Standard offense for driving under the influence of alcohol or drugs means the offense described in a State's statute that makes it a criminal offense to operate a motor vehicle while under the influence of alcohol or drugs, but does not require a measurement of alcohol or drug content.

(c) *Eligibility determination.* A State is eligible to apply for a grant under this section as a low-range State, a mid-range State or a high-range State, in accordance with paragraph (d), (e), or (f) of this section, as applicable. Independent of qualification on the basis of range, a State may also qualify for separate grants under this section as a State with an alcohol-ignition interlock law, as provided in paragraph (g) of this section, or as a State with a 24–7 sobriety program, as provided in paragraph (h) of this section.

(d) *Qualification criteria for a low-range State.* To qualify for an Impaired Driving Countermeasures Grant in a fiscal year, a low-range State (as determined by NHTSA) shall submit as part of its HSP the assurances in Part 3 of Appendix B that—

(1) The State shall use the funds awarded under 23 U.S.C. 405(d)(1) only for the implementation and enforcement of programs authorized in paragraph (j) of this section; and

(2) The lead State agency responsible for impaired driving programs shall maintain its aggregate expenditures for impaired driving programs at or above the average level of such expenditures in fiscal years 2014 and 2015.

(e) *Qualification criteria for a mid-range State.* (1) To qualify for an Impaired Driving Countermeasures Grant in a fiscal year, a mid-range State (as determined by NHTSA) shall submit as part of its HSP the assurances required in paragraph (d) of this section and a copy of a Statewide impaired driving plan that contains the following information, in accordance with part 3 of appendix B:

(i) Section that describes the authority and basis for the operation of the Statewide impaired driving task force, including the process used to develop and approve the plan and date of approval;

(ii) List that contains names, titles and organizations of all task force members, provided that the task force includes key stakeholders from the State highway safety agency, law enforcement and the criminal justice system (*e.g.*, prosecution, adjudication, probation) and, as determined appropriate by the State, representatives from areas such as 24–7 sobriety programs, driver licensing, treatment and rehabilitation, ignition interlock programs, data and traffic records, public health and communication;

(iii) Strategic plan based on the most recent version of Highway Safety Program Guideline No. 8—Impaired Driving, which, at a minimum, covers the following—

(A) Prevention;

(B) Criminal justice system;

(C) Communication programs;

(D) Alcohol and other drug misuse, including screening, treatment, assessment and rehabilitation; and

(E) Program evaluation and data.

(2) *Previously submitted plan.* A mid-range State that has received a grant for a previously submitted Statewide impaired driving plan under paragraph (e)(1) or (f)(1) of this section that was developed and approved within three years prior to the application due date may, in lieu of submitting the plan required under paragraph (e)(1) of this section, submit the assurances required in paragraph (d) of this section and a separate assurance that the State continues to use the previously submitted plan.

(f) *Qualification criteria for a high-range State.* (1) To qualify for an Impaired Driving Countermeasures Grant in a fiscal year, a high-range State (as determined by NHTSA) shall submit as part of its HSP the assurances required in paragraph (d) of this section, the date of a NHTSA-facilitated assessment of the State's impaired driving program conducted within three years prior to the application due date, a copy of a Statewide impaired driving plan that contains the information required in paragraphs (e)(1)(i) through (iii) of this section and that includes the following additional information, in accordance with part 3 of appendix B:

(i) Review that addresses in each plan area any related recommendations from the assessment of the State's impaired driving program;

(ii) Detailed project list for spending grant funds on impaired driving activities listed in paragraph (j)(4) of this section that must include high-visibility enforcement efforts, at the level of detail required under § 1300.11(d); and

(iii) Description of how the spending supports the State's impaired driving program and achievement of its performance targets, at the level of detail required under § 1300.11(d).

(2) *Previously submitted plans.* If a high-range State has received a grant for a previously submitted Statewide impaired driving plan under paragraph (f)(1) of this section, in order to receive a grant, the State may submit the assurances required in paragraph (d) of this section, and provide updates to its Statewide impaired driving plan that meet the requirements of paragraphs (e)(1)(i) through (iii) of this section and updates to its assessment review and spending plan that meet the requirements of paragraphs (f)(1)(i) through (iii) of this section.

(g) *Grants to States with Alcohol-Ignition Interlock Laws.* (1) To qualify for a grant, a State shall submit as part of its HSP legal citation(s), in accordance with part 4 of appendix B, to State statute demonstrating that the State has enacted and is enforcing a statute that requires all individuals convicted of driving under the influence of alcohol or of driving while intoxicated to drive only motor vehicles with alcohol-ignition interlocks for an authorized period of not less than 6 months.

(2) *Permitted exceptions.* A State statute providing for the following exceptions, and no others, shall not be deemed out of compliance with the requirements of paragraph (g)(1) of this section:

(i) The individual is required to operate an employer's motor vehicle in the course and scope of employment and the business entity that owns the vehicle is not owned or controlled by the individual;

(ii) The individual is certified in writing by a physician as being unable to provide a deep lung breath sample for analysis by an ignition interlock device; or

(iii) A State-certified ignition interlock provider is not available within 100 miles of the individual's residence.

(h) *Grants to States with a 24–7 Sobriety Program.* To qualify for a grant, a State shall submit the following as part of its HSP, in accordance with part 5 of appendix B:

(1) Legal citation(s) to State statute demonstrating that the State has enacted and is enforcing a statute that requires all individuals convicted of driving under the influence of alcohol or of driving while intoxicated to receive a restriction on driving privileges, unless an exception in paragraph (g)(2) of this section applies, for a period of not less than 30 days; and

(2) Legal citation(s) to State statute or submission of State program information that authorizes a Statewide 24–7 sobriety program.

(i) *Award.* (1) The amount available for grants under paragraphs (d)–(f) of this section shall be determined based on the total amount of eligible States for these grants and after deduction of the amounts necessary to fund grants under 23 U.S.C. 405(d)(6).

(2) The amount available for grants under 23 U.S.C. 405(d)(6)(A) shall not exceed 12 percent of the total amount made available to States under 23 U.S.C. 405(d) for the fiscal year.

(3) The amount available for grants under 23 U.S.C. 405(d)(6)(B) shall not exceed 3 percent of the total amount made available to States under 23 U.S.C. 405(d) for the fiscal year.

(j) *Use of grant funds*—(1) *Eligible uses.* Except as provided in paragraphs (j)(2)–(5) of this section, a State may use grant funds awarded under 23 U.S.C. 405(d) only for the following programs:

(i) High-visibility enforcement efforts;

(ii) Hiring a full-time or part-time impaired driving coordinator of the State's activities to address the enforcement and adjudication of laws regarding driving while impaired by alcohol;

(iii) Court support of high-visibility enforcement efforts, training and education of criminal justice professionals (including law enforcement, prosecutors, judges, and probation officers) to assist such professionals in handling impaired driving cases, hiring traffic safety resource prosecutors, hiring judicial outreach liaisons, and establishing driving while intoxicated courts;

(iv) Alcohol ignition interlock programs;

(v) Improving blood-alcohol concentration testing and reporting;

(vi) Paid and earned media in support of high-visibility enforcement of impaired driving laws, and conducting standardized field sobriety training, advanced roadside impaired driving evaluation training, and drug recognition expert training for law enforcement, and equipment and related expenditures used in connection with impaired driving enforcement;

(vii) Training on the use of alcohol and drug screening and brief intervention;

(viii) Training for and implementation of impaired driving assessment programs or other tools designed to increase the probability of identifying the recidivism risk of a person convicted of driving under the influence of alcohol, drugs, or a combination of alcohol and drugs and to determine the most effective mental health or substance abuse treatment or sanction that will reduce such risk;

(ix) Developing impaired driving information systems; or

(x) Costs associated with a 24–7 sobriety program.

(2) *Special rule—low-range States.* Notwithstanding paragraph (j)(1) of this section, a State that qualifies for grant funds as a low-range State may elect to use—

(i) Grant funds awarded under 23 U.S.C. 405(d) for programs designed to reduce impaired driving based on problem identification, in accordance with § 1300.11; and

(ii) Up to 50 percent of grant funds awarded under 23 U.S.C. 405(d) for any eligible project or activity under Section 402.

(3) *Special rule—mid-range States.* Notwithstanding paragraph (j)(1) of this section, a State that qualifies for grant funds as a mid-range State may elect to use grant funds awarded under 23 U.S.C. 405(d) for programs designed to reduce impaired driving based on problem identification in accordance with § 1300.11, provided the State receives advance approval from NHTSA.

(4) *Special rule—high-range States.* Notwithstanding paragraph (j)(1) of this section, a high-range State may use grant funds awarded under 23 U.S.C. 405(d) only for—

(i) High-visibility enforcement efforts; and

(ii) Any of the eligible uses described in paragraph (j)(1) of this section or programs designed to reduce impaired driving based on problem identification, in accordance with § 1300.11, if all proposed uses are described in a Statewide impaired driving plan submitted to and approved by NHTSA in accordance with paragraph (f) of this section.

(5) *Special rule—States with Alcohol-Ignition Interlock Laws or 24–7 Sobriety Programs.* Notwithstanding paragraph (j)(1) of this section, a State may elect to use grant funds awarded under 23 U.S.C. 405(d)(6) for any eligible project or activity under Section 402.

§ 1300.24 Distracted driving grants.

(a) *Purpose.* This section establishes criteria, in accordance with 23 U.S.C. 405(e), for awarding grants to States that enact and enforce a statute prohibiting distracted driving.

(b) *Definitions.* As used in this section—

Driving means operating a motor vehicle on a public road, and does not include operating a motor vehicle when the vehicle has pulled over to the side of, or off, an active roadway and has stopped in a location where it can safely remain stationary.

Texting means reading from or manually entering data into a personal wireless communications device, including doing so for the purpose of SMS texting, emailing, instant messaging, or engaging in any other form of electronic data retrieval or electronic data communication.

(c) *Qualification criteria for a Comprehensive Distracted Driving Grant.* To qualify for a Comprehensive Distracted Driving Grant in a fiscal year, a State shall submit as part of its HSP, in accordance with Part 6 of Appendix B—

(1) Sample distracted driving questions from the State's driver's license examination; and

(2) Legal citations to the State statute demonstrating compliance with the following requirements:

(i) *Prohibition on texting while driving.* The State statute shall—

(A) Prohibit all drivers from texting through a personal wireless communications device while driving;

(B) Make a violation of the statute a primary offense;

(C) Establish a minimum fine of $25 for a violation of the statute; and

(D) Not include an exemption that specifically allows a driver to text through a personal wireless communication device while stopped in traffic.

(ii) *Prohibition on youth cell phone use while driving.* The State statute shall—

(A) Prohibit a driver who is younger than 18 years of age or in the learner's permit or intermediate license stage set forth in § 1300.26(d) and (e) from using a personal wireless communications device while driving;

(B) Make a violation of the statute a primary offense;

(C) Establish a minimum fine of $25 for a violation of the statute; and

(D) Not include an exemption that specifically allows a driver to text through a personal wireless communication device while stopped in traffic.

(iii) *Permitted exceptions.* A State statute providing for the following exceptions, and no others, shall not be deemed out of compliance with the requirements of this section:

(A) A driver who uses a personal wireless communications device to contact emergency services;

(B) Emergency services personnel who use a personal wireless communications device while operating an emergency services vehicle and engaged in the performance of their duties as emergency services personnel; or

(C) An individual employed as a commercial motor vehicle driver or a school bus driver who uses a personal wireless communications device within the scope of such individual's employment if such use is permitted under the regulations promulgated pursuant to 49 U.S.C. 31136.

(d) *Use of funds for Comprehensive Distracted Driving Grants.* (1) *Eligible uses.* Except as provided in paragraphs (d)(2) and (3) of this section, a State may use grant funds awarded under 23 U.S.C. 405(e)(1) only to educate the public through advertising that contains information about the dangers of texting or using a cell phone while driving, for traffic signs that notify drivers about the distracted driving law of the State, or for law enforcement costs related to the enforcement of the distracted driving law.

(2) *Special rule.* Notwithstanding paragraph (d)(1) of this section, a State may elect to use up to 50 percent of the grant funds awarded under 23 U.S.C. 405(e)(1) for any eligible project or activity under Section 402.

(3) *Special rule—MMUCC conforming States.* Notwithstanding paragraphs (d)(1) and (2) of this section, a State may also use up to 75 percent of amounts received under 23 U.S.C. 405(e)(1) for any eligible project or activity under Section 402 if the State has conformed its distracted driving data to the most recent Model Minimum Uniform Crash Criteria (MMUCC). To demonstrate conformance with MMUCC, the State shall submit within 30 days after notification of award, the NHTSA-developed MMUCC Mapping spreadsheet, as described in "Mapping to MMUCC: A process for comparing police crash reports and state crash databases to the Model Minimum Uniform Crash Criteria" (DOT HS 812 184), as updated.

(e) *Qualification criteria for Special Distracted Driving Grants.* For fiscal years 2017 and 2018, to qualify for a Special Distracted Driving Grant, a State shall submit as part of its HSP the legal citations to the State statute demonstrating compliance with the following requirements, in accordance with part 6 of appendix B:

(1) For fiscal year 2017—

(i) The State has enacted and is enforcing a basic text messaging statute that applies to drivers of all ages;

(ii) The State statute makes a violation of the basic text messaging statute a primary or secondary offense; and

(iii) The State is not eligible for a Comprehensive Distracted Driving Grant under paragraph (c) of this section.

(2) For fiscal year 2018—

(i) The State has enacted and is enforcing a basic text messaging statute that applies to drivers of all ages;

(ii) The State statute makes a violation of the basic text messaging statute a primary offense;

(iii) The State imposes a fine for a violation of the basic text messaging statute;

(iv) The State has enacted and is enforcing a statute that prohibits drivers under the age of 18 from using a personal wireless communications device while driving; and

(v) The State is not eligible for a Comprehensive Distracted Driving Grant under paragraph (c) of this section.

(3) For purposes of this paragraph (e), "basic text messaging statute" means a statute that prohibits a driver, for the purpose of written communication, from manually inputting or reading from an electronic device while driving.

(4) *Use of grant funds for Special Distracted Driving Grants*—(i) *Eligible uses.* Except as provided in paragraph (e)(4)(ii) of this section, a State may use grant funds awarded under 23 U.S.C. 405(e)(6) only for activities related to the enforcement of distracted driving laws, including public information and awareness.

(ii) *Special rule.* Notwithstanding paragraph (e)(4)(i) of this section—

(A) In fiscal year 2017, a State may elect to use up to 15 percent of grant funds awarded under 23 U.S.C. 405(e)(6) for any eligible project or activity under Section 402.

(B) In fiscal year 2018, a State may elect to use up to 25 percent of grant funds awarded under 23 U.S.C. 405(e)(6) for any eligible project or activity under Section 402.

(f) *Award.* (1) The amount available for grants under paragraph (c)(1) of this section shall be determined after deduction of the amounts necessary to fund grants under 23 U.S.C. 405(e)(6).

(ii) The amount available for grants under 23 U.S.C. 405(e)(6) shall not exceed 25 percent of the total amount made available to States under 23 U.S.C. 405(e) for fiscal years 2017 and 2018.

§ 1300.25 Motorcyclist safety grants.

(a) *Purpose.* This section establishes criteria, in accordance with 23 U.S.C. 405(f), for awarding grants to States that adopt and implement effective programs to reduce the number of single-vehicle and multiple-vehicle crashes involving motorcyclists.

(b) *Definitions.* As used in this section—

Data State means a State that does not have a statute or regulation requiring that all fees collected by the State from motorcyclists for the purposes of funding motorcycle training and safety programs are to be used for motorcycle training and safety programs but can show through data and/or documentation from official records that all fees collected by the State from motorcyclists for the purposes of funding motorcycle training and safety programs were, in fact, used for motorcycle training and safety programs, without diversion.

Impaired means alcohol-impaired or drug-impaired as defined by State law, provided that the State's legal alcohol-impairment level does not exceed .08 BAC.

Law State means a State that has a statute or regulation requiring that all fees collected by the State from motorcyclists for the purposes of funding motorcycle training and safety programs are to be used for motorcycle training and safety programs an no statute or regulation diverting any of those fees.

Motorcycle means a motor vehicle with motive power having a seat or saddle for the use of the rider and designed to travel on not more than three wheels in contact with the ground.

State means any of the 50 States, the District of Columbia, and Puerto Rico.

(c) *Eligibility.* The 50 States, the District of Columbia and Puerto Rico are eligible to apply for a Motorcyclist Safety Grant.

(d) *Qualification criteria.* To qualify for a Motorcyclist Safety Grant in a fiscal year, a State shall submit as part of its HSP documentation demonstrating compliance with at least two of the criteria in paragraphs (e) through (j) of this section.

(e) *Motorcycle rider training course.* A State shall have an effective motorcycle rider training course that is offered throughout the State and that provides a formal program of instruction in accident avoidance and other safety-oriented operational skills to motorcyclists. To demonstrate compliance with this criterion, the State shall submit, in accordance with part 7 of appendix B—

(1) A certification identifying the head of the designated State authority over motorcyclist safety issues and stating that the head of the designated State authority over motorcyclist safety issues has approved and the State has adopted one of the following introductory rider curricula:

(i) Motorcycle Safety Foundation Basic Rider Course;

(ii) TEAM OREGON Basic Rider Training;

(iii) Idaho STAR Basic I;

(iv) California Motorcyclist Safety Program Motorcyclist Training Course;

(v) A curriculum that has been approved by the designated State authority and NHTSA as meeting NHTSA's Model National Standards for Entry-Level Motorcycle Rider Training; and

(2) A list of the counties or political subdivisions in the State where motorcycle rider training courses will be conducted during the fiscal year of the grant and the number of registered motorcycles in each such county or political subdivision according to official State motor vehicle records, provided that the State must offer at least one motorcycle rider training course in counties or political subdivisions that collectively account for a majority of the State's registered motorcycles.

(f) *Motorcyclist awareness program.* A State shall have an effective Statewide program to enhance motorist awareness of the presence of motorcyclists on or near roadways and safe driving practices that avoid injuries to motorcyclists. To demonstrate compliance with this criterion, the State shall submit, in accordance with part 7 of appendix B—

(1) A certification identifying head of the designated State authority over motorcyclist safety issues and stating that the State's motorcyclist awareness program was developed by or in coordination with the designated State authority over motorcyclist safety issues; and

(2) One or more performance measures and corresponding performance targets developed for motorcycle awareness at the level of detail required under § 1300.11(c) that identifies, using State crash data, the counties or political subdivisions within the State with the highest number of motorcycle crashes involving a motorcycle and another motor vehicle. Such data shall be from the most recent calendar year for which final State crash data is available, but data no older than three calendar years prior to the application due date (*e.g.,* for a grant application submitted on July 1, 2016, a State shall provide calendar year 2015 data, if available, and may not provide data older than calendar year 2013); and

(3) Countermeasure strategies and projects, at the level of detail required under § 1300.11(d), demonstrating that the State will implement data-driven programs in a majority of counties or political subdivisions where there is at least one motorcycle crash causing a serious or fatal injury. The State shall select countermeasure strategies and projects to address the State's motorcycle safety problem areas in order to meet the performance targets identified in paragraph (f)(2) of this section.

(g) *Reduction of fatalities and crashes involving motorcycles.* A State shall demonstrate a reduction for the preceding calendar year in the number of motorcyclist fatalities and in the rate of motor vehicle crashes involving motorcycles in the State (expressed as a function of 10,000 registered motorcycle registrations), as computed by NHTSA. To demonstrate compliance a State shall in accordance with part 7 of appendix B—

(1) Submit in its HSP State data showing the total number of motor vehicle crashes involving motorcycles in the State for the most recent calendar year for which final State crash data is available, but data no older than three calendar years prior to the application due date and the same type of data for the calendar year immediately prior to that calendar year (*e.g.,* for a grant application submitted on July 1, 2016, the State shall submit calendar year 2014 data and 2013 data, if both data are available, and may not provide data older than calendar year 2013 and 2012, to determine the rate);

(2) Experience a reduction of at least one in the number of motorcyclist fatalities for the most recent calendar year for which final FARS data is available as compared to the final FARS data for the calendar year immediately prior to that year; and

(3) Based on State crash data expressed as a function of 10,000 motorcycle registrations (using FHWA motorcycle registration data), experience at least a whole number reduction in the rate of crashes involving motorcycles for the most recent calendar year for which final State crash data is available, but data no older than three calendar years prior to the application due date, as compared to the calendar year immediately prior to that year.

(h) *Impaired driving program.* A State shall implement a Statewide program to reduce impaired driving, including specific measures to reduce impaired motorcycle operation. The State shall submit, in accordance with part 7 of appendix B—

(1) One or more performance measures and corresponding performance targets developed to reduce impaired motorcycle operation at the level of detail required under § 1300.11(c). Each performance measure and performance target shall identify

the impaired motorcycle operation problem area to be addressed. Problem identification must include an analysis of motorcycle crashes involving an impaired operator by county or political subdivision in the State; and

(2) Countermeasure strategies and projects, at the level of detail required under § 1300.11(d), demonstrating that the State will implement data-driven programs designed to reach motorcyclists in those jurisdictions where the incidence of motorcycle crashes involving an impaired operator is highest (*i.e.*, the majority of counties or political subdivisions in the State with the highest numbers of motorcycle crashes involving an impaired operator) based upon State data. Such data shall be from the most recent calendar year for which final State crash data is available, but data no older than three calendar years prior to the application due date (*e.g.*, for a grant application submitted on July 1, 2016, a State shall provide calendar year 2014 data, if available, and may not provide data older than calendar year 2013). Countermeasure strategies and projects shall prioritize the State's impaired motorcycle problem areas to meet the performance targets identified in paragraph (h)(1) of this section.

(i) *Reduction of fatalities and accidents involving impaired motorcyclists.* A State shall demonstrate a reduction for the preceding calendar year in the number of fatalities and in the rate of reported crashes involving alcohol-impaired and drug-impaired motorcycle operators (expressed as a function of 10,000 motorcycle registrations), as computed by NHTSA. The State shall, in accordance with part 7 of appendix B—

(1) Submit in its HSP State data showing the total number of reported crashes involving alcohol- and drug-impaired motorcycle operators in the State for the most recent calendar year for which final State crash data is available, but data no older than three calendar years prior to the application due date and the same type of data for the calendar year immediately prior to that year (*e.g.*, for a grant application submitted on July 1, 2016, the State shall submit calendar year 2014 data and 2013 data, if both data are available, and may not provide data older than calendar year 2013 and 2012, to determine the rate);

(2) Experience a reduction of at least one in the number of fatalities involving alcohol-impaired and drug-impaired motorcycle operators for the most recent calendar year for which final FARS data is available as compared to the final FARS data for the calendar year immediately prior to that year; and

(3) Based on State crash data expressed as a function of 10,000 motorcycle registrations (using FHWA motorcycle registration data), experience at least a whole number reduction in the rate of reported crashes involving alcohol-and drug-impaired motorcycle operators for the most recent calendar year for which final State crash data is available, but data no older than three calendar years prior to the application due date, as compared to the calendar year immediately prior to that year.

(j) *Use of fees collected from motorcyclists for motorcycle programs.* A State shall have a process under which all fees collected by the State from motorcyclists for the purposes of funding motorcycle training and safety programs are used for motorcycle training and safety programs. A State may qualify under this criterion as either a Law State or a Data State.

(1) To demonstrate compliance as a Law State, the State shall submit, in accordance with part 7 of appendix B, the legal citation to the statutes or regulations requiring that all fees collected by the State from motorcyclists for the purposes of funding motorcycle training and safety programs are to be used for motorcycle training and safety programs and the legal citations to the State's current fiscal year appropriation (or preceding fiscal year appropriation, if the State has not enacted a law at the time of the State's application) appropriating all such fees to motorcycle training and safety programs.

(2) To demonstrate compliance as a Data State, the State shall submit, in accordance with part 7 of appendix B, data or documentation from official records from the previous State fiscal year showing that all fees collected by the State from motorcyclists for the purposes of funding motorcycle training and safety programs were, in fact, used for motorcycle training and safety programs. Such data or documentation shall show that revenues collected for the purposes of funding motorcycle training and safety programs were placed into a distinct account and expended only for motorcycle training and safety programs.

(k) *Award limitation.* A grant awarded under 23 U.S.C. 405(f) may not exceed 25 percent of the amount apportioned to the State for fiscal year 2009 under Section 402.

(l) *Use of grant funds*—(1) *Eligible uses.* Except as provided in paragraph (l)(2) of this section, a State may use grant funds awarded under 23 U.S.C. 405(f) only for motorcyclist safety training and motorcyclist awareness programs, including—

(i) Improvements to motorcyclist safety training curricula;

(ii) Improvements in program delivery of motorcycle training to both urban and rural areas, including—

(A) Procurement or repair of practice motorcycles;

(B) Instructional materials;

(C) Mobile training units; and

(D) Leasing or purchasing facilities for closed-course motorcycle skill training;

(iii) Measures designed to increase the recruitment or retention of motorcyclist safety training instructors; or

(iv) Public awareness, public service announcements, and other outreach programs to enhance driver awareness of motorcyclists, including "share-the-road" safety messages developed using Share-the-Road model language available on NHTSA's Web site at *http://www.trafficsafetymarketing.gov.*

(2) *Special rule—low fatality States.* Notwithstanding paragraph (l)(1) of this section, a State may elect to use up to 50 percent of grant funds awarded under 23 U.S.C. 405(f) for any eligible project or activity under Section 402 if the State is in the lowest 25 percent of all States for motorcycle deaths per 10,000 motorcycle registrations (using FHWA motorcycle registration data) based on the most recent calendar year for which final FARS data is available, as determined by NHTSA.

(3) *Suballocation of funds.* A State that receives a grant under this section may suballocate funds from the grant to a nonprofit organization incorporated in that State to carry out grant activities under this section.

§ 1300.26 State graduated driver licensing incentive grants.

(a) *Purpose.* This section establishes criteria, in accordance with 23 U.S.C. 405(g), for awarding grants to States that adopt and implement a graduated driver's licensing statute that requires novice drivers younger than 18 years of age to comply with a 2-stage licensing process prior to receiving an unrestricted driver's license.

(b) *Definitions.* As used in this section—

Driving-related offense means any offense under State or local law relating to the use or operation of a motor vehicle, including but not limited to driving while intoxicated, reckless driving, driving without wearing a seat belt, child restraint violation, speeding, prohibited use of a personal wireless communications device, violation of the driving-related restrictions applicable to the stages of the graduated driver's licensing process set forth in paragraphs (d) and (e) of this section, and moving violations. The term does not include offenses related to motor vehicle registration, insurance, parking, or the presence or functionality of motor vehicle equipment.

Licensed driver means an individual who possesses a valid unrestricted driver's license.

Unrestricted driver's license means full, non-provisional driver's licensure to operate a motor vehicle on public roadways.

(c) *Qualification criteria—General.* To qualify for a State Graduated Driver Licensing Incentive Grant in a fiscal year, a State shall provide as part of its HSP legal citations to the State statute demonstrating compliance with the requirements provided in paragraphs (d) and (e) of this section, in accordance with in part 8 of appendix B.

(d) *Learner's permit stage.* A State's graduated driver's licensing statute shall include a learner's permit stage that—

(1) Applies to any driver, prior to being issued by the State any permit, license, or endorsement to operate a motor vehicle on public roadways other than a learner's permit, who—

(i) Is younger than 18 years of age; and

(ii) Has not been issued an intermediate license or unrestricted driver's license by any State;

(2) Commences only after an applicant for a learner's permit passes a vision test and a knowledge assessment (*e.g.*, written or computerized) covering the rules of the road, signs, and signals;

(3) Is in effect for a period of at least 6 months, and remains in effect until the learner's permit holder—

(i) Reaches at least 16 years of age and enters the intermediate stage; or

(ii) Reaches 18 years of age;

(4) Requires the learner's permit holder to be accompanied and supervised, at all times while operating a motor vehicle, by a licensed driver who is at least 21 years of age or is a State-certified driving instructor;

(5) Requires the learner's permit holder to either—

(i) Complete a State-certified driver education or training course; or

(ii) Receive at least 50 hours of behind-the-wheel training, with at least 10 of those hours at night, with a licensed driver who is at least 21 years of age or is a State-certified driving instructor;

(6) Prohibits the learner's permit holder from using a personal wireless communications device while driving (as defined in § 1300.24(b)) except as permitted under § 1300.24(c)(2)(iii), provided that the State's statute—

(i) Makes a violation of the prohibition a primary offense; and

(ii) Does not include an exemption that specifically allows a driver to text through a personal wireless communication device while stopped in traffic; and

(7) Requires that, in addition to any other penalties imposed by State statute, the duration of the learner's permit stage be extended if the learner's permit holder is convicted of a driving-related offense or misrepresentation of a driver's true age during at least the first 6 months of that stage.

(e) *Intermediate stage.* A State's graduated driver's licensing statute shall include an intermediate stage that—

(1) Commences—

(i) After an applicant younger than 18 years of age successfully completes the learner's permit stage;

(ii) Prior to the applicant being issued by the State another permit, license, or endorsement to operate a motor vehicle on public roadways other than an intermediate license; and

(iii) Only after the applicant passes a behind-the-wheel driving skills assessment;

(2) Is in effect for a period of at least 6 months, and remains in effect until the intermediate license holder reaches at least 17 years of age;

(3) Requires the intermediate license holder to be accompanied and supervised, while operating a motor vehicle between the hours of 10:00 p.m. and 5:00 a.m. during the first 6 months of the intermediate stage, by a licensed driver who is at least 21 years of age or is a State-certified driving instructor, except when operating a motor vehicle for the purposes of work, school, religious activities, or emergencies;

(4) Prohibits the intermediate license holder from operating a motor vehicle with more than 1 nonfamilial passenger younger than 21 years of age unless a licensed driver who is at least 21 years of age or is a State-certified driving instructor is in the motor vehicle;

(5) Prohibits the intermediate license holder from using a personal wireless communications device while driving (as defined in § 1300.24(b)) except as permitted under § 1300.24(c)(2)(iii), provided that the State's statute—

(i) Makes a violation of the prohibition a primary offense; and

(ii) Does not include an exemption that specifically allows a driver to text through a personal wireless communication device while stopped in traffic; and

(6) Requires that, in addition to any other penalties imposed by State statute, the duration of the intermediate stage be extended if the intermediate license holder is convicted of a driving-related offense or misrepresentation of a driver's true age during at least the first 6 months of that stage.

(f) *Exceptions.* A State that otherwise meets the minimum requirements set forth in paragraphs (d) and (e) of this section will not be deemed ineligible for a grant under this section if—

(1) The State enacted a statute prior to January 1, 2011, establishing a class of permit or license that allows drivers younger than 18 years of age to operate a motor vehicle—

(i) In connection with work performed on, or for the operation of, a farm owned by family members who are directly related to the applicant or licensee; or

(ii) If demonstrable hardship would result from the denial of a license to the licensee or applicant, provided that the State requires the applicant or licensee to affirmatively and adequately demonstrate unique undue hardship to the individual; and

(2) A driver younger than 18 years of age who possesses only the permit or license described in paragraph (f)(1) of this section and applies for any other permit, license, or endorsement to operate a motor vehicle is subject to the graduated driver's licensing requirements of paragraphs (d) and (e) of this section and is required to begin with the learner's permit stage.

(g) *Award determination.* Subject to § 1300.20(e)(2), the amount of a grant award to a State in a fiscal year under 23 U.S.C. 405(g) shall be in proportion to the amount each such State received under Section 402 for that fiscal year.

(h) *Use of grant funds*—(1) *Eligible uses.* Except as provided in paragraphs (h)(2) and (3), a State may use grant funds awarded under 23 U.S.C. 405(g) only as follows:

(i) To enforce the State's graduated driver's licensing process;

(ii) To provide training for law enforcement personnel and other relevant State agency personnel relating to the enforcement of the State's graduated driver's licensing process;

(iii) To publish relevant educational materials that pertain directly or indirectly to the State's graduated driver's licensing law;

(iv) To carry out administrative activities to implement the State's graduated driver's licensing process; or

(v) To carry out a teen traffic safety program described in 23 U.S.C. 402(m).

(2) *Special rule.* Notwithstanding paragraph (h)(1) of this section, a State may elect to use up to 75 percent of the grant funds awarded under 23 U.S.C. 405(g) for any eligible project or activity under Section 402.

(3) *Special rule—low fatality States.* Notwithstanding paragraphs (h)(1) and (2) of this section, a State may elect to

use up to 100 percent of the grant funds awarded under 23 U.S.C. 405(g) for any eligible project or activity under Section 402 if the State is in the lowest 25 percent of all States for the number of drivers under age 18 involved in fatal crashes in the State as a percentage of the total number of drivers under age 18 in the State, as determined by NHTSA.

§ 1300.27 Nonmotorized safety grants.

(a) *Purpose.* This section establishes criteria, in accordance with 23 U.S.C. 405(h), for awarding grants to States for the purpose of decreasing pedestrian and bicyclist fatalities and injuries that result from crashes involving a motor vehicle.

(b) *Eligibility determination.* A State is eligible for a grant under this section if the State's annual combined pedestrian and bicyclist fatalities exceed 15 percent of the State's total annual crash fatalities based on the most recent calendar year for which final FARS data is available, as determined by NHTSA.

(c) *Qualification criteria.* To qualify for a Nonmotorized Safety Grant in a fiscal year, a State meeting the eligibility requirements of paragraph (b) of this section shall submit as part of its HSP the assurances that the State shall use the funds awarded under 23 U.S.C. 405(h) only for the authorized uses identified in paragraph (d) of this section, in accordance with part 9 of appendix B.

(d) *Use of grant funds.* A State may use grant funds awarded under 23 U.S.C. 405(h) only for—

(1) Training of law enforcement officials on State laws applicable to pedestrian and bicycle safety;

(2) Enforcement mobilizations and campaigns designed to enforce State traffic laws applicable to pedestrian and bicycle safety; or

(3) Public education and awareness programs designed to inform motorists, pedestrians, and bicyclists of State traffic laws applicable to pedestrian and bicycle safety.

§ 1300.28 Racial profiling data collection grants.

(a) *Purpose.* This section establishes criteria, in accordance with Section 1906, for incentive grants to encourage States to maintain and allow public inspection of statistical information on the race and ethnicity of the driver for all motor vehicle stops made on all public roads except those classified as local or minor rural roads.

(b) *Qualification criteria.* To qualify for a Racial Profiling Data Collection Grant in a fiscal year, a State shall submit as part of its HSP, in accordance with in part 10 of appendix B—

(1) Official documents (*i.e.,* a law, regulation, binding policy directive, letter from the Governor or court order) that demonstrate that the State maintains and allows public inspection of statistical information on the race and ethnicity of the driver for each motor vehicle stop made by a law enforcement officer on all public roads except those classified as local or minor rural roads; or

(2) The assurances that the State will undertake activities during the fiscal year of the grant to comply with the requirements of paragraph (b)(1) of this section and a list of one or more projects in its HSP to support the assurances.

(c) *Limitation.* (1) On or after October 1, 2015, a State may not receive a grant under paragraph (b)(2) of this section in more than 2 fiscal years.

(2) Notwithstanding § 1300.20(e)(2), the total amount of a grant awarded to a State under this section in a fiscal year may not exceed 5 percent of the funds available under this section in the fiscal year.

(d) *Use of grant funds.* A State may use grant funds awarded under Section 1906 only for the costs of—

(1) Collecting and maintaining data on traffic stops; or

(2) Evaluating the results of the data.

Subpart D—Administration of the Highway Safety Grants

§ 1300.30 General.

Subject to the provisions of this subpart, the requirements of 2 CFR parts 200 and 1201 govern the implementation and management of State highway safety programs and projects carried out under 23 U.S.C. Chapter 4 and Section 1906.

§ 1300.31 Equipment.

(a) *Title.* Except as provided in paragraphs (e) and (f) of this section, title to equipment acquired under 23 U.S.C. Chapter 4 and Section 1906 will vest upon acquisition in the State or its subrecipient, as appropriate, subject to the conditions in paragraphs (b) through (d) of this section.

(b) *Use.* All equipment shall be used for the originally authorized grant purposes for as long as needed for those purposes, as determined by the Regional Administrator, and neither the State nor any of its subrecipients or contractors shall encumber the title or interest while such need exists.

(c) *Management and disposition.* Subject to the requirements of paragraphs (b), (d), (e), and (f) of this section, States and their subrecipients and contractors shall manage and dispose of equipment acquired under 23 U.S.C. Chapter 4 and Section 1906 in accordance with State laws and procedures.

(d) *Major purchases and dispositions.* Equipment with a useful life of more than one year and an acquisition cost of $5,000 or more shall be subject to the following requirements—

(1) Purchases shall receive prior written approval from the Regional Administrator;

(2) Dispositions shall receive prior written approval from the Regional Administrator unless the equipment has exceeded its useful life as determined under State law and procedures.

(e) *Right to transfer title.* The Regional Administrator may reserve the right to transfer title to equipment acquired under this part to the Federal Government or to a third party when such third party is eligible under Federal statute. Any such transfer shall be subject to the following requirements:

(1) The equipment shall be identified in the grant or otherwise made known to the State in writing;

(2) The Regional Administrator shall issue disposition instructions within 120 calendar days after the equipment is determined to be no longer needed for highway safety purposes, in the absence of which the State shall follow the applicable procedures in 2 CFR parts 200 and 1201.

(f) *Federally-owned equipment.* In the event a State or its subrecipient is provided Federally-owned equipment:

(1) Title shall remain vested in the Federal Government;

(2) Management shall be in accordance with Federal rules and procedures, and an annual inventory listing shall be submitted by the State;

(3) The State or its subrecipient shall request disposition instructions from the Regional Administrator when the item is no longer needed for highway safety purposes.

§ 1300.32 Amendments to Highway Safety Plans—approval by the Regional Administrator.

During the fiscal year of the grant, States may amend the HSP, except performance targets, after approval under § 1300.14. States shall document changes to the HSP electronically, including project information. Such changes are subject to approval by the Regional Administrator. The Regional Administrator must approve changes in the HSP before reimbursement of vouchers related to such changes.

§ 1300.33 Vouchers and project agreements.

(a) *General.* Each State shall submit official vouchers for expenses incurred to the Regional Administrator.

(b) *Content of vouchers.* At a minimum, each voucher shall provide the following information for expenses:

(1) Project numbers for which expenses were incurred and for which reimbursement is being sought;

(2) Amount of Federal funds for reimbursement;

(3) Amount of Federal funds allocated to local benefit (provided no less than mid-year (by March 31) and with the final voucher);

(4) Amount of indirect cost;

(5) Amount of Planning and Administration costs;

(6) Matching rate (or special matching writeoff used, *i.e.*, sliding scale rate authorized under 23 U.S.C. 120); and

(7) Program funding code.

(c) *Project agreements.* Copies of each project agreement for which expenses are being claimed under the voucher (and supporting documentation for the vouchers) shall be made promptly available for review by the Regional Administrator upon request. Each project agreement shall bear the project number to allow the Regional Administrator to match the voucher to the corresponding activity.

(d) *Submission requirements.* At a minimum, vouchers shall be submitted to the Regional Administrator on a quarterly basis, no later than 15 working days after the end of each quarter, except that where a State receives funds by electronic transfer at an annualized rate of one million dollars or more, vouchers shall be submitted on a monthly basis, no later than 15 working days after the end of each month. A final voucher for the fiscal year shall be submitted to the Regional Administrator no later than 90 days after the end of the fiscal year, and all unexpended balances shall be carried forward to the next fiscal year.

(e) *Reimbursement.* (1) Failure to provide the information specified in paragraph (b) of this section shall result in rejection of the voucher.

(2) Failure to meet the deadlines specified in paragraph (d) of this section may result in delayed reimbursement.

(3) Vouchers that request reimbursement for projects whose project numbers or amounts claimed do not match the projects or exceed the estimated amount of Federal funds provided under § 1300.11(d) or amended under § 1300.32, shall be rejected, in whole or in part, until an amended project and/or estimated amount of Federal funds is submitted to and approved by the Regional Administrator in accordance with § 1300.32.

§ 1300.34 [Reserved].

§ 1300.35 Annual report.

Within 90 days after the end of the fiscal year, each State shall submit electronically an Annual Report providing—

(a) An assessment of the State's progress in achieving performance targets identified in the prior year HSP;

(b) A description of the projects and activities funded and implemented along with the amount of Federal funds obligated and expended under the prior year HSP;

(c) A description of the State's evidence-based enforcement program activities;

(d) An explanation of reasons for projects that were not implemented; and

(e) A description of how the projects funded under the prior year HSP contributed to meeting the State's highway safety performance targets.

§ 1300.36 Appeals of written decision by a Regional Administrator.

The State shall submit an appeal of any written decision by a Regional Administrator regarding the administration of the grants in writing, signed by the Governor's Representative for Highway Safety, to the Regional Administrator. The Regional Administrator shall promptly forward the appeal to the NHTSA Associate Administrator, Regional Operations and Program Delivery. The decision of the NHTSA Associate Administrator shall be final and shall be transmitted to the Governor's Representative for Highway Safety through the Regional Administrator.

Subpart E—Annual Reconciliation

§ 1300.40 Expiration of the Highway Safety Plan.

(a) The State's Highway Safety Plan for a fiscal year and the State's authority to incur costs under that HSP shall expire on the last day of the fiscal year.

(b) Except as provided in paragraph (c) of this section, each State shall submit a final voucher which satisfies the requirements of § 1300.33(b) within 90 days after the expiration of the State's HSP. The final voucher constitutes the final financial reconciliation for each fiscal year.

(c) The Regional Administrator may extend the time period for no more than 30 days to submit a final voucher only in extraordinary circumstances. States shall submit a written request for an extension describing the extraordinary circumstances that necessitate an extension. The approval of any such request for extension shall be in writing, shall specify the new deadline for submitting the final voucher, and shall be signed by the Regional Administrator.

§ 1300.41 Disposition of unexpended balances.

(a) *Carry-forward balances.* Except as provided in paragraph (b) of this section, grant funds that remain unexpended at the end of a fiscal year and the expiration of a Highway Safety Plan shall be credited to the State's highway safety account for the new fiscal year, and made immediately available for use by the State, provided the following requirements are met:

(1) The State's new Highway Safety Plan has been approved by the Regional Administrator pursuant to § 1300.14 of this part, including any amendments to the HSP pursuant to § 1300.32; and

(2) The State has assigned all available 23 U.S.C. Chapter 4 and Section 1906 funds to specific project agreements, including project numbers.

(b) *Deobligation of funds.* (1) Except as provided in paragraph (b)(2) of this section, unexpended grant funds shall not be available for expenditure beyond the period of three years after the last day of the fiscal year of apportionment or allocation.

(2) NHTSA shall notify States of any such unexpended grant funds no later than 180 days prior to the end of the period of availability specified in paragraph (b)(1) of this section and inform States of the deadline for commitment. States may commit such unexpended grant funds to a specific project by the specified deadline, and shall provide documentary evidence of that commitment, including a copy of an executed project agreement, to the Regional Administrator.

(3) Grant funds committed to a specific project in accordance with paragraph (b)(2) of this section shall remain committed to that project and must be expended by the end of the succeeding fiscal year. The final voucher for that project shall be submitted within 90 days after the end of that fiscal year.

(4) NHTSA shall deobligate unexpended balances at the end of the time period in paragraph (b)(1) or (3) of this section, whichever is applicable, and the funds shall lapse.

§ 1300.42 Post-grant adjustments.

The expiration of a Highway Safety Plan does not affect the ability of NHTSA to disallow costs and recover funds on the basis of a later audit or other review or the State's obligation to return any funds due as a result of later refunds, corrections, or other transactions.

§ 1300.43 Continuing requirements.

Notwithstanding the expiration of a Highway Safety Plan, the provisions in 2 CFR parts 200 and 1201 and 23 CFR part 1300, including but not limited to equipment and audit, continue to apply to the grant funds authorized under 23 U.S.C. Chapter 4 and Section 1906.

Subpart F—Non-Compliance

§ 1300.50 General.

Where a State is found to be in non-compliance with the requirements of the grant programs authorized under 23 U.S.C. Chapter 4 or Section 1906, or with other applicable law, the sanctions in §§ 1300.51 and 1300.52, and any other sanctions or remedies permitted under Federal law, including the special conditions of 2 CFR 200.207 and 200.388, may be applied as appropriate.

§ 1300.51 Sanctions—reduction of apportionment.

(a) *Determination of sanctions.* (1) The Administrator shall not apportion any funds under Section 402 to any State that does not have or is not implementing an approved highway safety program.

(2) If the Administrator has apportioned funds under Section 402 to a State and subsequently determines that the State is not implementing an approved highway safety program, the Administrator shall reduce the apportionment by an amount equal to not less than 20 percent, until such time as the Administrator determines that the State is implementing an approved highway safety program. The Administrator shall consider the gravity of the State's failure to implement an approved highway safety program in determining the amount of the reduction.

(i) When the Administrator determines that a State is not implementing an approved highway safety program, the Administrator shall issue to the State an advance notice, advising the State that the Administrator expects to withhold funds from apportionment or reduce the State's apportionment under Section 402. The Administrator shall state the amount of the expected withholding or reduction.

(ii) The State may, within 30 days after its receipt of the advance notice, submit documentation demonstrating that it is implementing an approved highway safety program. Documentation shall be submitted to the NHTSA Administrator, 1200 New Jersey Avenue SE., Washington, DC 20590.

(b) *Apportionment of withheld funds.* (1) If the Administrator concludes that a State has begun implementing an approved highway safety program, the Administrator shall promptly apportion to the State the funds withheld from its apportionment, but not later than July 31 of the fiscal year for which the funds were withheld.

(2)(i) If the Administrator concludes, after reviewing all relevant documentation submitted by the State or if the State has not responded to the advance notice, that the State did not correct its failure to have or implement an approved highway safety program, the Administrator shall issue a final notice, advising the State of the funds being withheld from apportionment or of the reduction of apportionment under Section 402 by July 31 of the fiscal year for which the funds were withheld.

(ii) The Administrator shall reapportion the withheld funds to the other States, in accordance with the formula specified in 23 U.S.C. 402(c), not later than the last day of the fiscal year.

§ 1300.52 Risk assessment and non-compliance.

(a) *Risk assessment.* (1) All States receiving funds under the grant programs authorized under 23 U.S.C. Chapter 4 and Section 1906 shall be subject to an assessment of risk by NHTSA. In evaluating risks of a State highway safety program, NHTSA may consider, but is not limited to considering, the following for each State:

(i) Financial stability;

(ii) Quality of management systems and ability to meet management standards prescribed in this part and in 2 CFR part 200;

(iii) History of performance. The applicant's record in managing funds received for grant programs under this part, including findings from Management Reviews;

(iv) Reports and findings from audits performed under 2 CFR part 200, subpart F, or from the reports and findings of any other available audits; and

(v) The State's ability to effectively implement statutory, regulatory, and other requirements imposed on non-Federal entities.

(2) If a State is determined to pose risk, NHTSA may increase monitoring activities and may impose any of the specific conditions of 2 CFR 200.207, as appropriate.

(b) *Non-compliance.* If at any time a State is found to be in non-compliance with the requirements of the grant programs under this part, the requirements of 2 CFR parts 200 and 1201, or with any other applicable law, the actions permitted under 2 CFR 200.207 and 200.338 may be applied as appropriate.

Subpart G—Special Provisions for Fiscal Year 2017 Highway Safety Grants

§ 1300.60 Fiscal Year 2017 grant applications.

(a) Except as provided in paragraph (b) of this section, fiscal year 2017 grant applications due July 1, 2016 shall be governed by the following provisions:

(1) For the Highway Safety Plans, 23 CFR 1200.11 (April 1, 2015);

(2) For occupant protection grants under 23 U.S.C. 405(b), 23 CFR 1200.21(d)(1) through (4) and (e) (April 1, 2015) and 23 CFR 1300.21(d)(5) (maintenance of effort);

(3) For State traffic safety information system improvements grants under 23 U.S.C. 405(c), 23 CFR 1200.22(b) through (e) (April 1, 2015) and 23 CFR 1300.22(c) (maintenance of effort);

(4) For impaired griving countermeasures grants under 23 U.S.C. 405(d)(1), 23 CFR 1200.23(d)(1), (e), and (f) (April 1, 2015), and 23 CFR 1300.23(d)(2) (maintenance of effort);

(5) For grants to States with alcohol-ignition interlock laws and 24–7 sobriety programs under 23 U.S.C. 405(d)(6), 23 CFR 1300.23(g) and (h);

(6) For distracted driving grants under 23 U.S.C. 405(e), 23 CFR 1300.24;

(7) For motorcyclist safety grants under 23 U.S.C. 405(f), 23 CFR 1200.25(d)–(j) (April 1, 2015);

(8) For State graduated driver licensing incentive grants under 23 U.S.C. 405(g), 23 CFR 1300.26;

(9) For nonmotorized safety grants under 23 U.S.C. 405(h), 23 CFR 1300.27;

(10) For racial profiling data collection grants under Section 1906, 23 CFR 1300.28.

(b) States may elect to apply under 23 CFR part 1300 for any of the grants under paragraph (a) of this section.

§ 1300.61 Fiscal Year 2017 grants—general and administrative provisions.

(a) Fiscal year 2017 grants awarded under 23 U.S.C. Chapter 4 and Section 1906 are governed by the following general and administrative provisions in part 1300:

(1) Subpart A—all sections;

(2) Subpart B:

(i) 23 CFR 1300.10 General;

(ii) 23 CFR 1300.12 Due date for submission;

(iii) 23 CFR 1300.13 Special funding conditions for Section 402 Grants;

(iv) 23 CFR 1300.15 Apportionment and obligation of Federal funds;

(3) Subpart C:

(i) 23 CFR 1300.20 General;

(ii) 23 CFR 1300.21(a) through (c) and (f) Occupant protection grants—purpose, definitions, elibigibility determination, and use of grant funds;

(iii) 23 CFR 1300.22(a) and (d) State traffic safety information system improvements grants—purpose and use of grant funds;

(iv) 23 CFR 1300.23(a) through (c), (i), and (j) Impaired driving countermeasures grants—purpose, definitions, eligibility determinations, award and use of grant funds;

(v) 23 CFR 1300.1300.24 Distracted driving grants—all paragraphs;

(vi) 23 CFR 1300.25(a) through (c), (k) and (l) Motorcyclist safety grants—purpose, definitions, eligibility, award limitation, use of grant funds;

(vii) 23 CFR 1300.26 State graduated driving licensing incentive grants—all paragraphs;

(viii) 23 CFR 1300.27 Nonmotorized safety grants—all paragraphs;

(ix) 23 CFR 1300.28 Racial profiling data collection grants—all paragraphs.

(4) Subpart D:

(i) 23 CFR 1300.30 General;

(ii) 23 CFR 1300.31 Equipment;

(iii) 23 CFR 1300.35 Annual report;

(iv) 23 CFR 1300.36 Appeals of written decision by Regional Administrator;

(5) Subpart E—all sections;

(6) Subpart F—all sections.

(b) Except as provided in paragraph (c) of this section, fiscal year 2017 grants awarded under 23 U.S.C. Chapter 4 and Section 1906 are also governed by the following general and administrative provisions in part 1200:

(1) Subpart B—23 CFR 1200.14 Review and approval procedures;

(2) Subpart D:

(i) 23 CFR 1200.32 Changes—approval of the approving official (Regional Administrator);

(ii) 23 CFR 1200.33 Vouchers and project agreements.

(c) States may elect to follow all sections of part 1300.

Appendix A to Part 1300—Certifications and Assurances for Highway Safety Grants (23 U.S.C. Chapter 4; Sec. 1906, Public Law 109–59, As Amended By Sec. 4011, Public Law 114–94)

[*Each fiscal year, the Governor's Representative for Highway Safety must sign these Certifications and Assurances affirming that the State complies with all requirements, including applicable Federal statutes and regulations, that are in effect during the grant period. Requirements that also apply to subrecipients are noted under the applicable caption.*]

State: ______ Fiscal Year: ____

By submitting an application for Federal grant funds under 23 U.S.C. Chapter 4 or Section 1906, the State Highway Safety Office acknowledges and agrees to the following conditions and requirements. In my capacity as the Governor's Representative for Highway Safety, I hereby provide the following Certifications and Assurances:

GENERAL REQUIREMENTS

The State will comply with applicable statutes and regulations, including but not limited to:

- 23 U.S.C. Chapter 4—Highway Safety Act of 1966, as amended
- Sec. 1906, Public Law 109–59, as amended by Sec. 4011, Public Law 114–94
- 23 CFR part 1300—Uniform Procedures for State Highway Safety Grant Programs
- 2 CFR part 200—Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards
- 2 CFR part 1201—Department of Transportation, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards

INTERGOVERNMENTAL REVIEW OF FEDERAL PROGRAMS

The State has submitted appropriate documentation for review to the single point of contact designated by the Governor to review Federal programs, as required by Executive Order 12372 (Intergovernmental Review of Federal Programs).

FEDERAL FUNDING ACCOUNTABILITY AND TRANSPARENCY ACT (FFATA)

The State will comply with FFATA guidance, *OMB Guidance on FFATA Subward and Executive Compensation Reporting,* August 27, 2010, (*https://www.fsrs.gov/documents/OMB_Guidance_on_FFATA_Subaward_and_Executive_Compensation_Reporting_08272010.pdf*) by reporting to FSRS.gov for each sub-grant awarded:

- Name of the entity receiving the award;
- Amount of the award;
- Information on the award including transaction type, funding agency, the North American Industry Classification System code or Catalog of Federal Domestic Assistance number (where applicable), program source;
- Location of the entity receiving the award and the primary location of performance under the award, including the city, State, congressional district, and country; and an award title descriptive of the purpose of each funding action;
- A unique identifier (DUNS);
- The names and total compensation of the five most highly compensated officers of the entity if:

(i) the entity in the preceding fiscal year received—

(I) 80 percent or more of its annual gross revenues in Federal awards;

(II) $25,000,000 or more in annual gross revenues from Federal awards; and

(ii) the public does not have access to information about the compensation of the senior executives of the entity through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986;

- Other relevant information specified by OMB guidance.

NONDISCRIMINATION

(applies to subrecipients as well as States)

The State highway safety agency will comply with all Federal statutes and implementing regulations relating to nondiscrimination ("Federal Nondiscrimination Authorities"). These include but are not limited to:

- **Title VI of the Civil Rights Act of 1964** (42 U.S.C. 2000d *et seq.,* 78 stat. 252), (prohibits discrimination on the basis of race, color, national origin) and 49 CFR part 21;
- **The Uniform Relocation Assistance and Real Property Acquisition Policies** Act of 1970, (42 U.S.C. 4601), (prohibits unfair treatment of persons displaced or whose property has been acquired because of Federal or Federal-aid programs and projects);
- **Federal-Aid Highway Act of 1973,** (23 U.S.C. 324 *et seq.),* **and Title IX of the Education Amendments of 1972,** as amended (20 U.S.C. 1681–1683 and 1685–1686) (prohibit discrimination on the basis of sex);
- **Section 504 of the Rehabilitation Act of 1973,** (29 U.S.C. 794 *et seq.),* as amended, (prohibits discrimination on the basis of disability) and 49 CFR part 27;
- **The Age Discrimination Act of 1975,** as amended, (42 U.S.C. 6101 *et seq.),* (prohibits discrimination on the basis of age);
- **The Civil Rights Restoration Act of 1987,** (Pub. L. 100–209), (broadens scope, coverage and applicability of Title VI of the Civil Rights Act of 1964, The Age Discrimination Act of 1975 and Section 504 of the Rehabilitation Act of 1973, by expanding the definition of the terms "programs or activities" to include all of the programs or activities of the Federal aid recipients, sub-recipients and contractors, whether such programs or activities are Federally-funded or not);
- **Titles II and III of the Americans with Disabilities Act** (42 U.S.C. 12131–12189) (prohibits discrimination on the basis of disability in the operation of public entities, public and private transportation systems, places of public accommodation, and certain testing) and 49 CFR parts 37 and 38;
- **Executive Order 12898, Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations** (prevents discrimination against minority populations by discouraging programs, policies, and activities with disproportionately high and adverse human health or environmental effects on minority and low-income populations); and
- **Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency** (guards against Title VI national origin discrimination/discrimination because of limited English proficiency (LEP) by ensuring that funding recipients take reasonable steps to ensure that LEP persons have meaningful access to programs (70 FR 74087–74100).

The State highway safety agency—

- Will take all measures necessary to ensure that no person in the United States shall, on the grounds of race, color, national origin, disability, sex, age, limited English proficiency, or membership in any other class protected by Federal Nondiscrimination Authorities, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any of its programs or activities, so long as any portion of the program is Federally-assisted.
- Will administer the program in a manner that reasonably ensures that any of its subrecipients, contractors, subcontractors, and consultants receiving Federal financial assistance under this program will comply with all requirements of the Non-Discrimination Authorities identified in this Assurance;
- Agrees to comply (and require any of its subrecipients, contractors, subcontractors, and consultants to comply) with all applicable provisions of law or regulation governing US DOT's or NHTSA's access to records, accounts, documents, information, facilities, and staff, and to cooperate and comply with any program or compliance reviews, and/or complaint investigations conducted by US DOT or NHTSA under any Federal Nondiscrimination Authority;
- Acknowledges that the United States has a right to seek judicial enforcement with regard to any matter arising under these Non-Discrimination Authorities and this Assurance;
- Insert in all contracts and funding agreements with other State or private entities the following clause:

"During the performance of this contract/funding agreement, the contractor/funding recipient agrees—

a. To comply with all Federal nondiscrimination laws and regulations, as may be amended from time to time;

b. Not to participate directly or indirectly in the discrimination prohibited by any Federal non-discrimination law or regulation, as set forth in appendix B of 49 CFR part 21 and herein;

c. To permit access to its books, records, accounts, other sources of information, and its facilities as required by the State highway safety office, US DOT or NHTSA;

d. That, in event a contractor/funding recipient fails to comply with any nondiscrimination provisions in this contract/funding agreement, the State highway safety agency will have the right to impose such contract/agreement sanctions as it or NHTSA determine are appropriate, including but not limited to withholding payments to the contractor/funding recipient under the contract/agreement until the contractor/funding recipient complies; and/or cancelling, terminating, or suspending a contract or funding agreement, in whole or in part; and

e. To insert this clause, including paragraphs a through e, in every subcontract and subagreement and in every solicitation for a subcontract or sub-agreement, that receives Federal funds under this program.

THE DRUG-FREE WORKPLACE ACT OF 1988 (41 U.S.C. 8103)

The State will provide a drug-free workplace by:

a. Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;

b. Establishing a drug-free awareness program to inform employees about:

- ○ The dangers of drug abuse in the workplace.
- ○ The grantee's policy of maintaining a drug-free workplace.
- ○ Any available drug counseling, rehabilitation, and employee assistance programs.
- ○ The penalties that may be imposed upon employees for drug violations occurring in the workplace.
- ○ Making it a requirement that each employee engaged in the performance of the grant be given a copy of the statement required by paragraph (a).

c. Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will—

- ○ Abide by the terms of the statement.
- ○ Notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than five days after such conviction.

d. Notifying the agency within ten days after receiving notice under subparagraph (c)(2) from an employee or otherwise receiving actual notice of such conviction.

e. Taking one of the following actions, within 30 days of receiving notice under subparagraph (c)(2), with respect to any employee who is so convicted—

- ○ Taking appropriate personnel action against such an employee, up to and including termination.
- ○ Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.

f. Making a good faith effort to continue to maintain a drug-free workplace through implementation of all of the paragraphs above.

POLITICAL ACTIVITY (HATCH ACT)

(applies to subrecipients as well as States)

The State will comply with provisions of the Hatch Act (5 U.S.C. 1501–1508), which limits the political activities of employees whose principal employment activities are funded in whole or in part with Federal funds.

CERTIFICATION REGARDING FEDERAL LOBBYING

(applies to subrecipients as well as States)

Certification for Contracts, Grants, Loans, and Cooperative Agreements

The undersigned certifies, to the best of his or her knowledge and belief, that:

1. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

2. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

3. The undersigned shall require that the language of this certification be included in the award documents for all sub-award at all tiers (including subcontracts, subgrants, and contracts under grant, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

RESTRICTION ON STATE LOBBYING

(applies to subrecipients as well as States)

None of the funds under this program will be used for any activity specifically designed to urge or influence a State or local legislator to favor or oppose the adoption of any specific legislative proposal pending before any State or local legislative body. Such activities include both direct and indirect (*e.g.*, "grassroots") lobbying activities, with one exception. This does not preclude a State official whose salary is supported with NHTSA funds from engaging in direct communications with State or local legislative officials, in accordance with customary State practice, even if such communications urge legislative officials to favor or oppose the adoption of a specific pending legislative proposal.

CERTIFICATION REGARDING DEBARMENT AND SUSPENSION

(applies to subrecipients as well as States)

Instructions for Primary Certification (States)

1. By signing and submitting this proposal, the prospective primary participant is providing the certification set out below and

agrees to comply with the requirements of 2 CFR parts 180 and 1300.

2. The inability of a person to provide the certification required below will not necessarily result in denial of participation in this covered transaction. The prospective participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency's determination whether to enter into this transaction. However, failure of the prospective primary participant to furnish a certification or an explanation shall disqualify such person from participation in this transaction.

3. The certification in this clause is a material representation of fact upon which reliance was placed when the department or agency determined to enter into this transaction. If it is later determined that the prospective primary participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default or may pursue suspension or debarment.

4. The prospective primary participant shall provide immediate written notice to the department or agency to which this proposal is submitted if at any time the prospective primary participant learns its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

5. The terms *covered transaction, debarment, suspension, ineligible, lower tier, participant, person, primary tier, principal, and voluntarily excluded,* as used in this clause, have the meaning set out in the Definitions and coverage sections of 2 CFR part 180. You may contact the department or agency to which this proposal is being submitted for assistance in obtaining a copy of those regulations.

6. The prospective primary participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by NHTSA.

7. The prospective primary participant further agrees by submitting this proposal that it will include the clause titled "Instructions for Lower Tier Certification" including the "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transaction," provided by the department or agency entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions and will require lower tier participants to comply with 2 CFR parts 180 and 1300.

8. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the list of Parties Excluded from Federal Procurement and Non-procurement Programs.

9. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

10. Except for transactions authorized under paragraph 6 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, the department or agency may disallow costs, annul or terminate the transaction, issue a stop work order, debar or suspend you, or take other remedies as appropriate.

Certification Regarding Debarment, Suspension, and Other Responsibility Matters—Primary Covered Transactions

(1) The prospective primary participant certifies to the best of its knowledge and belief, that its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded by any Federal department or agency;

(b) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of record, making false statements, or receiving stolen property;

(c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or Local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and

(d) Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State, or local) terminated for cause or default.

(2) Where the prospective primary participant is unable to certify to any of the Statements in this certification, such prospective participant shall attach an explanation to this proposal.

Instructions for Lower Tier Certification

1. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below and agrees to comply with the requirements of 2 CFR parts 180 and 1300.

2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

4. The terms *covered transaction, debarment, suspension, ineligible, lower tier, participant, person, primary tier, principal, and voluntarily excluded,* as used in this clause, have the meanings set out in the Definition and Coverage sections of 2 CFR part 180. You may contact the person to whom this proposal is submitted for assistance in obtaining a copy of those regulations.

5. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by NHTSA.

6. The prospective lower tier participant further agrees by submitting this proposal that it will include the clause titled "Instructions for Lower Tier Certification" including the "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transaction," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions and will require lower tier participants to comply with 2 CFR parts 180 and 1300.

7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the List of Parties Excluded from Federal Procurement and Non-procurement Programs.

8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, the department or agency with which this transaction originated may disallow costs, annul or terminate the transaction, issue a stop work order, debar or suspend you, or take other remedies as appropriate.

Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transactions

1. The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.

2. Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

BUY AMERICA ACT

(applies to subrecipients as well as States)

The State and each subrecipient will comply with the Buy America requirement (23 U.S.C. 313) when purchasing items using Federal funds. Buy America requires a State, or subrecipient, to purchase only steel, iron and manufactured products produced in the United States with Federal funds, unless the Secretary of Transportation determines that such domestically produced items would be inconsistent with the public interest, that such materials are not reasonably available and of a satisfactory quality, or that inclusion of domestic materials will increase the cost of the overall project contract by more than 25 percent. In order to use Federal funds to purchase foreign produced items, the State must submit a waiver request that provides an adequate basis and justification to and approved by the Secretary of Transportation.

PROHIBITION ON USING GRANT FUNDS TO CHECK FOR HELMET USAGE

(applies to subrecipients as well as States)

The State and each subrecipient will not use 23 U.S.C. Chapter 4 grant funds for programs to check helmet usage or to create checkpoints that specifically target motorcyclists.

POLICY ON SEAT BELT USE

In accordance with Executive Order 13043, Increasing Seat Belt Use in the United States, dated April 16, 1997, the Grantee is encouraged to adopt and enforce on-the-job seat belt use policies and programs for its employees when operating company-owned, rented, or personally-owned vehicles. The National Highway Traffic Safety Administration (NHTSA) is responsible for providing leadership and guidance in support of this Presidential initiative. For information on how to implement such a program, or statistics on the potential benefits and cost-savings to your company or organization, please visit the Buckle Up America section on NHTSA's Web site at *www.nhtsa.dot.gov.* Additional resources are available from the Network of Employers for Traffic Safety (NETS), a public-private partnership headquartered in the Washington, DC metropolitan area, and dedicated to improving the traffic safety practices of employers and employees. NETS is prepared to provide technical assistance, a simple, user-friendly program kit, and an award for achieving the President's goal of 90 percent seat belt use. NETS can be contacted at 1 (888) 221–0045 or visit its Web site at *www.trafficsafety.org.*

POLICY ON BANNING TEXT MESSAGING WHILE DRIVING

In accordance with Executive Order 13513, Federal Leadership On Reducing Text Messaging While Driving, and DOT Order 3902.10, Text Messaging While Driving, States are encouraged to adopt and enforce workplace safety policies to decrease crashed caused by distracted driving, including policies to ban text messaging while driving company-owned or -rented vehicles, Government-owned, leased or rented vehicles, or privately-owned when on official Government business or when performing any work on or behalf of the Government. States are also encouraged to conduct workplace safety initiatives in a manner commensurate with the size of the business, such as establishment of new rules and programs or re-evaluation of existing programs to prohibit text messaging while driving, and education, awareness, and other outreach to employees about the safety risks associated with texting while driving.

SECTION 402 REQUIREMENTS

1. To the best of my personal knowledge, the information submitted in the Highway Safety Plan in support of the State's application for a grant under 23 U.S.C. 402 is accurate and complete.

2. The Governor is the responsible official for the administration of the State highway safety program, by appointing a Governor's Representative for Highway Safety who shall be responsible for a State highway safety agency that has adequate powers and is suitably equipped and organized (as evidenced by appropriate oversight procedures governing such areas as procurement, financial administration, and the use, management, and disposition of equipment) to carry out the program. (23 U.S.C. 402(b)(1)(A))

3. The political subdivisions of this State are authorized, as part of the State highway safety program, to carry out within their jurisdictions local highway safety programs which have been approved by the Governor and are in accordance with the uniform guidelines promulgated by the Secretary of Transportation. (23 U.S.C. 402(b)(1)(B))

4. At least 40 percent of all Federal funds apportioned to this State under 23 U.S.C. 402 for this fiscal year will be expended by or for the benefit of political subdivisions of the State in carrying out local highway safety programs (23 U.S.C. 402(b)(1)(C)) or 95 percent by and for the benefit of Indian tribes (23 U.S.C. 402(h)(2)), unless this requirement is waived in writing. (This provision is not applicable to the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.)

5. The State's highway safety program provides adequate and reasonable access for the safe and convenient movement of physically handicapped persons, including those in wheelchairs, across curbs constructed or replaced on or after July 1, 1976, at all pedestrian crosswalks. (23 U.S.C. 402(b)(1)(D))

6. The State will provide for an evidenced-based traffic safety enforcement program to prevent traffic violations, crashes, and crash fatalities and injuries in areas most at risk for such incidents. (23 U.S.C. 402(b)(1)(E))

7. The State will implement activities in support of national highway safety goals to reduce motor vehicle related fatalities that also reflect the primary data-related crash factors within the State, as identified by the State highway safety planning process, including:

- Participation in the National high-visibility law enforcement mobilizations as identified annually in the NHTSA Communications Calendar, including not less than 3 mobilization campaigns in each fiscal year to—
  - ○ Reduce alcohol-impaired or drug-impaired operation of motor vehicles; and
  - ○ Increase use of seatbelts by occupants of motor vehicles;
- Submission of information regarding mobilization participation into the HVE Database;
- Sustained enforcement of statutes addressing impaired driving, occupant protection, and driving in excess of posted speed limits;
- An annual Statewide seat belt use survey in accordance with 23 CFR part 1340 for the measurement of State seat belt use rates, except for the Secretary of Interior on behalf of Indian tribes;
- Development of Statewide data systems to provide timely and effective data analysis to support allocation of highway safety resources;
- Coordination of Highway Safety Plan, data collection, and information systems with the State strategic highway safety plan, as defined in 23 U.S.C. 148(a).

(23 U.S.C. 402(b)(1)(F))

8. The State will actively encourage all relevant law enforcement agencies in the State to follow the guidelines established for vehicular pursuits issued by the International Association of Chiefs of Police that are currently in effect. (23 U.S.C. 402(j))

9. The State will not expend Section 402 funds to carry out a program to purchase, operate, or maintain an automated traffic enforcement system. (23 U.S.C. 402(c)(4))

The State: [***CHECK ONLY ONE***]

☐ Certifies that automated traffic enforcement systems are not used on any public road in the State;

OR

☐ Is unable to certify that automated traffic enforcement systems are not used on any public road in the State, and therefore will conduct a survey meeting the requirements of 23 CFR 1300.13(d)(3) AND will submit the survey results to the NHTSA Regional office no later than March 1 of the fiscal year of the grant.

I understand that my statements in support of the State's application for Federal grant funds are statements upon which the Federal Government will rely in determining qualification for grant funds, and that knowing misstatements may be subject to civil or criminal penalties under 18 U.S.C. 1001. I sign these Certifications and Assurances based on personal knowledge, and after appropriate inquiry.

Signature Governor's Representative for Highway Safety

Date

Printed name of Governor's Representative for Highway Safety

Appendix B to Part 1300—Application Requirements for Section 405 and Section 1906 Grants

[*Each fiscal year, to apply for a grant under 23 U.S.C. 405 or Section 1906, Public Law 109–59, as amended by Section 4011, Public Law 114–94, the State must complete and submit all required information in this appendix, and the Governor's Representative for Highway Safety must sign the Certifications and Assurances.*]

State: ______ Fiscal Year: ____

Instructions: Check the box for each part for which the State is applying for a grant, fill in relevant blanks, and identify the attachment number or page numbers where the requested information appears in the HSP. Attachments may be submitted electronically.

☐ **Part 1: Occupant Protection Grants (23 CFR 1300.21)**

[*Check the box above **only** if applying for this grant.*]

All States:

[*Fill in **all** blanks below.*]

- The lead State agency responsible for occupant protection programs will maintain its aggregate expenditures for occupant protection programs at or above the average level of such expenditures in fiscal years 2014 and 2015. (23 U.S.C. 405(a)(9))
- The State's occupant protection program area plan for the upcoming fiscal year is provided as HSP page or attachment # ______.
- The State will participate in the Click it or Ticket national mobilization in the fiscal year of the grant. The description of the State's planned participation is provided as HSP page or attachment # ______.
- A table that documents the State's active network of child restraint inspection stations is provided as HSP page or attachment # ______. Such table includes (1) the total number of inspection stations/events in the State; and (2) the total number of inspection stations and/or inspection events that service rural and urban areas and at-risk populations (*e.g.*, low income, minority). Each inspection station/event is staffed with at least one current nationally Certified Child Passenger Safety Technician.
- A table, as provided in HSP page or attachment # ______, identifies the number of classes to be held, location of classes, and estimated number of students needed to ensure coverage of child passenger safety inspection stations and inspection events by nationally Certified Child Passenger Safety Technicians.

Lower Seat belt Use States Only:

[*Check **at least 3 boxes** below and fill in **all** blanks under those checked boxes.*]

☐ The State's **primary seat belt use law,** requiring all occupants riding in a passenger motor vehicle to be restrained in a seat belt or a child restraint, was enacted on ____/____/____ and last amended on ____/____/____, is in effect, and will be enforced during the fiscal year of the grant. **Legal citation(s):** ______.

☐ The State's **occupant protection law,** requiring occupants to be secured in a seat belt or age-appropriate child restraint while in a passenger motor vehicle and a minimum fine of $25, was enacted on ____/____/____ and last amended on ____/____/____, is in effect, and will be enforced during the fiscal year of the grant.

Legal citations:

- ______ Requirement for all occupants to be secured in seat belt or age appropriate child restraint;
- ______ Coverage of all passenger motor vehicles ;
- ______ Minimum fine of at least $25;
- ______ Exemptions from restraint requirements.

☐ The State's seat belt enforcement plan is provided as HSP page or attachment # ______.

☐ The State's high risk population countermeasure program is provided as HSP page or attachment # ______.

☐ The State's comprehensive occupant protection program is provided as follows:

- Date of NHTSA-facilitated program assessment conducted within 5 years prior to the application date: ____/____/____;
- Multi-year strategic plan: HSP page or attachment # ____;
- Name and title of State's designated occupant protection coordinator: ______
- List that contains the names, titles and organizations of the Statewide occupant protection task force membership: HSP page or attachment # ______.

☐ The State's NHTSA-facilitated occupant protection program assessment of all elements of its occupant protection program was conducted on ______/______/______ (within 3 years of the application due date);

☐ **Part 2: State Traffic Safety Information System Improvements Grants (23 CFR 1300.22)**

[*Check the box above **only** if applying for this grant.*]

All States:

- The lead State agency responsible for traffic safety information system improvements programs will maintain its aggregate expenditures for traffic safety information system improvements programs at or above the average level of such expenditures in fiscal years 2014 and 2015. (23 U.S.C. 405(a)(9))

[*Fill in **all** blanks for each bullet below.*]

- A list of at least 3 TRCC meeting dates during the 12 months preceding the application due date is provided as HSP page or attachment # ______.
- The name and title of the State's Traffic Records Coordinator is ____________.

- A list of the TRCC members by name, title, home organization and the core safety database represented is provided as HSP page or attachment # ______.
- The State Strategic Plan is provided as follows:
  - Description of specific, quantifiable and measurable improvements: HSP page or attachment # ______;
  - List of all recommendations from most recent assessment: HSP page or attachment # ______;
  - Recommendations to be addressed, including projects and performance measures: HSP page or attachment # ______;
  - Recommendations not to be addressed, including reasons for not implementing: HSP page or attachment # ______.
- Written description of the performance measures, and all supporting data, that the State is relying on to demonstrate achievement of the quantitative improvement in the preceding 12 months of the application due date in relation to one or more of the significant data program attributes is provided as HSP page or attachment # ______.
- The State's most recent assessment or update of its highway safety data and traffic records system was completed on ______/______/______.

☐ **Part 3: Impaired Driving Countermeasures (23 CFR 1300.23(D)–(F))**

[*Check the box above **only** if applying for this grant.*]

All States:

- The lead State agency responsible for impaired driving programs will maintain its aggregate expenditures for impaired driving programs at or above the average level of such expenditures in fiscal years 2014 and 2015.
- The State will use the funds awarded under 23 U.S.C. 405(d) only for the implementation of programs as provided in 23 CFR 1200.23(j) in the fiscal year of the grant.

Mid-Range State Only:

[*Check **one box** below and fill in **all** blanks under that checked box.*]

☐ The State submits its Statewide impaired driving plan approved by a Statewide impaired driving task force on ____/______/______. Specifically—

- HSP page or attachment # ______ describes the authority and basis for operation of the Statewide impaired driving task force;
- HSP page or attachment # ______ contains the list of names, titles and organizations of all task force members;
- HSP page or attachment # ______ contains the strategic plan based on Highway Safety Guideline No. 8—Impaired Driving.

☐ The State has previously submitted a Statewide impaired driving plan approved by a Statewide impaired driving task force on ______/______/______ and continues to use this plan.

High-Range State Only:

[*Check **one box** below and fill in **all** blanks under that checked box.*]

☐ The State submits its Statewide impaired driving plan approved by a Statewide impaired driving task force on ______/______/______ that includes a review of a NHTSA-facilitated assessment of the State's impaired driving program conducted on ______/______/______. Specifically,—

- HSP page or attachment # ______ describes the authority and basis for operation of the Statewide impaired driving task force;
- HSP page or attachment # ______ contains the list of names, titles and organizations of all task force members;
- HSP page or attachment # ______ contains the strategic plan based on Highway Safety Guideline No. 8—Impaired Driving;
- HSP page or attachment # ______ addresses any related recommendations from the assessment of the State's impaired driving program;
- HSP page or attachment # ______ contains the detailed project list for spending grant funds;
- HSP page or attachment # ______ describes how the spending supports the State's impaired driving program and achievement of its performance targets.

☐ The State submits an updated Statewide impaired driving plan approved by a Statewide impaired driving task force on ______/______/______ and updates its assessment review and spending plan provided as HSP page or attachment # ______.

☐ Part 4: Alcohol-Ignition Interlock Laws (23 CFR 1300.23(G))

[*Check the box above **only** if applying for this grant.*]

[*Fill in **all** blanks.*]

The State provides citations to a law that requires all individuals convicted of driving under the influence or of driving while intoxicated to drive only motor vehicles with alcohol-ignition interlocks for a period of 6 months that was enacted on ______/______/______ and last amended on ______/______/______, is in effect, and will be enforced during the fiscal year of the grant. Legal citation(s): ____________________.

☐ Part 5: 24-7 Sobriety Programs (23 CFR 1300.23(H))

[*Check the box above **only** if applying for this grant.*]

[*Fill in **all** blanks.*]

The State provides citations to a law that requires all individuals convicted of driving under the influence or of driving while intoxicated to receive a restriction on driving privileges that was enacted on ______/______/______ and last amended on ______/______/______, is in effect, and will be enforced during the fiscal year of the grant. Legal citation(s): ____________________.

[*Check **at least one of the boxes** below and fill in **all** blanks under that checked box.*]

☐ *Law citation.* The State provides citations to a law that authorizes a Statewide 24-7 sobriety program that was enacted on ______/______/______ and last amended on ______/______/______, is in effect, and will be enforced during the fiscal year of the grant. **Legal citation(s):** ____________________.

☐ *Program information.* The State provides program information that authorizes a Statewide 24-7 sobriety program. The program information is provided as HSP page or attachment # ______.

☐ Part 6: Distracted Driving Grants (23 CFR 1300.24)

[*Check the box above **only** if applying for this grant.*]

[*Check **one box only** below and fill in all blanks under that checked box only.*]

☐ Comprehensive Distracted Driving Grant

- The State provides sample distracted driving questions from the State's driver's license examination in HSP page or attachment # ______.
- **Prohibition on Texting While Driving**

The State's texting ban statute, prohibiting texting while driving, a minimum fine of at least $25, was enacted on ______/______/______ and last amended on ______/______/______, is in effect, and will be enforced during the fiscal year of the grant.

Legal citations:

- ______ Prohibition on texting while driving;
- ______ Definition of covered wireless communication devices;
- ______ Minimum fine of at least $25 for an offense;
- ______ Exemptions from texting ban.

- **Prohibition on Youth Cell Phone Use While Driving**

The State's youth cell phone use ban statute, prohibiting youth cell phone use while driving, driver license testing of distracted driving issues, a minimum fine of at least $25, was enacted on ______/______/______ and last amended on ______/______/______, is in effect, and will be enforced during the fiscal year of the grant.

Legal citations:

- ______ Prohibition on youth cell phone use while driving;
- ______ Definition of covered wireless communication devices;
- ______ Minimum fine of at least $25 for an offense;
- ______ Exemptions from youth cell phone use ban.

- The State has conformed its distracted driving data to the most recent Model Minimum Uniform Crash Criteria (MMUCC) and will provide supporting data (*i.e.*, NHTSA-developed MMUCC Mapping spreadsheet) within 30 days after notification of award.

☐ Special Distracted Driving Grant for Fiscal Year 2017

- The State's basic text messaging statute applying to drivers of all ages was enacted on ______/______/______ and last amended on ______/______/______, is in effect, and will be enforced during the fiscal year of the grant.

Legal citations:

- ______ Basic text messaging statute;
- ______ Primary or secondary enforcement.

- The State is **NOT** eligible for a Comprehensive Distracted Driving Grant.

☐ Special Distracted Driving Grant for Fiscal Year 2018

- The State's basic text messaging statute applying to drivers of all ages was enacted ______/______/______ and last amended on ______/______/______, is in effect, and will be enforced during the fiscal year of the grant.

Legal citations:

- ______ Basic text messaging statute;
- ______ Primary enforcement;
- ______ Fine for a violation of the basic text messaging statute;

- The State's youth cell phone use ban statute, prohibiting youth cell phone use while driving, was enacted on ______/______/______ and last amended on ______/______/______, is in effect, and will be enforced during the fiscal year of the grant.

Legal citations:

- ______ Prohibition on youth cell phone use while driving;
- ______ Definition of covered wireless communication devices.

- The State is **NOT** eligible for a Comprehensive Distracted Driving Grant.

☐ Part 7: Motorcyclist Safety Grants (23 CFR 1300.25)

[*Check the box above **only** if applying for this grant.*]

[*Check **at least 2 boxes** below and fill in **all** blanks under those checked boxes **only**.*]

☐ Motorcycle riding training course:

- The name and organization of the head of the designated State authority over motorcyclist safety issues is ______.
- The head of the designated State authority over motorcyclist safety issues has approved and the State has adopted one of the following introductory rider curricula: [*Check one of the following boxes below and fill in any blanks.*]

☐ Motorcycle Safety Foundation Basic Rider Course;

☐ TEAM OREGON Basic Rider Training;

☐ Idaho STAR Basic I;

☐ California Motorcyclist Safety Program Motorcyclist Training Course;

☐ Other curriculum that meets NHTSA's Model National Standards for Entry-Level Motorcycle Rider Training and that has been approved by NHTSA.

- On HSP page or attachment # ______, a list of counties or political subdivisions in the State where motorcycle rider training courses will be conducted during the fiscal year of the grant AND number of registered motorcycles in each such county or political subdivision according to official State motor vehicle records.

☐ **Motorcyclist awareness program:**

- The name and organization of the head of the designated State authority over motorcyclist safety issues is ______.
- The State's motorcyclist awareness program was developed by or in coordination with the designated State authority having jurisdiction over motorcyclist safety issues.
- On HSP page or attachment # ______, performance measures and corresponding performance targets developed for motorcycle awareness that identifies, using State crash data, the counties or political subdivisions within the State with the highest number of motorcycle crashes involving a motorcycle and another motor vehicle.
- On HSP page or attachment # ______, countermeasure strategies and projects demonstrating that the State will implement data-driven programs in a majority of counties or political subdivisions corresponding with the majority of crashes involving at least one motorcycle and at least one motor vehicle causing a serious or fatal injury to at least one motorcyclist or motor vehicle occupant.

☐ **Reduction of fatalities and crashes involving motorcycles:**

- Data showing the total number of motor vehicle crashes involving motorcycles is provided as HSP page or attachment # ______.
- Description of the State's methods for collecting and analyzing data is provided as HSP page or attachment # ______.

☐ **Impaired driving program:**

- On HSP page or attachment # ______, performance measures and corresponding performance targets developed to reduce impaired motorcycle operation.
- On HSP page or attachment # ______, countermeasure strategies and projects demonstrating that the State will implement data-driven programs designed to reach motorcyclists and motorists in those jurisdictions where the incidence of motorcycle crashes involving an impaired operator is highest (*i.e.*, the majority of counties or political subdivisions in the State with the highest numbers of motorcycle crashes involving an impaired operator) based upon State data.

☐ **Reduction of fatalities and accidents involving impaired motorcyclists:**

- Data showing the total number of reported crashes involving alcohol-impaired and drug-impaired motorcycle operators is provided as HSP page or attachment # ______.
- Description of the State's methods for collecting and analyzing data is provided as HSP page or attachment # ______.

☐ **Use of fees collected from motorcyclists for motorcycle programs:**

[*Check **one box only** below and fill in **all** blanks under the checked box **only**.*]

☐ Applying as a Law State—

- The State law or regulation requires all fees collected by the State from motorcyclists for the purpose of funding motorcycle training and safety programs are to be used for motorcycle training and safety programs. **Legal citation(s):** ______.

AND

- The State's law appropriating funds for FY ______ requires all fees collected by the State from motorcyclists for the purpose of funding motorcycle training and safety programs be spent on motorcycle training and safety programs. **Legal citation(s):** ______.

☐ Applying as a Data State—

- Data and/or documentation from official State records from the previous fiscal year showing that **all** fees collected by the State from motorcyclists for the purpose of funding motorcycle training and safety programs were used for motorcycle training and safety programs is provided HSP page or attachment # ______.

☐ **Part 8: State Graduated Driver Licensing Incentive Grants (23 CFR 1300.26)**

[*Check the box above **only** if applying for this grant.*]

[*Fill in **all** applicable blanks below.*]

The State's graduated driver licensing statute, requiring both a learner's permit stage and intermediate stage prior to receiving a full driver's license, was last amended on ______/______/______, is in effect, and will be enforced during the fiscal year of the grant.

Learner's Permit Stage—

Legal citations:

- ______ Applies prior to receipt of any other permit, license, or endorsement if applicant is younger than 18 years of age.
- ______Applicant must pass vision test and knowledge assessments
- ______In effect for at least 6 months
- ______In effect until driver is at least 16 years of age
- ______Must be accompanied and supervised at all times
- ______Requires completion of State-certified driver education course or at least 50 hours of behind-the-wheel training with at least 10 of those hours at night
- ______Prohibition on use of personal wireless communications device
- ______Extension of learner's permit stage if convicted
- ______Exemptions from graduated driver licensing law

Intermediate Stage—

Legal citations:

- ______Commences after applicant younger than 18 years of age successfully completes the learner's permit stage, but prior to receipt of any other permit, license, or endorsement
- ______Applicant must pass behind-the-wheel driving skills assessment
- ______In effect for at least 6 months
- ______In effect until driver is at least 17 years of age
- ______Must be accompanied and supervised between hours of 10:00 p.m. and 5:00 a.m. during first 6 months of stage, except when operating a motor vehicle for the purposes of work, school, religious activities, or emergencies
- ______No more than 1 nonfamilial passenger younger than 21 allowed
- ______Prohibition on use of personal wireless communications device
- ______Extension of intermediate stage if convicted
- ______Exemptions from graduated driver licensing law

☐ **Part 9: Nonmotorized Safety Grants (23 CFR 1300.27)**

[*Check the box above **only** applying for this grant AND **only** if NHTSA has identified the State as eligible because the State annual combined pedestrian and bicyclist fatalities exceed 15 percent of the State's total annual crash fatalities based on the most recent calendar year final FARS data.*]

The State affirms that it will use the funds awarded under 23 U.S.C. 405(h) only for the implementation of programs as provided in 23 CFR 1200.27(d) in the fiscal year of the grant.

☐ **Part 10: Racial Profiling Data Collection Grants (23 CFR 1300.28)**

[*Check the box above **only** if applying for this grant.*]

[*Check one box **only** below and fill in **all** blanks under the checked box only.*]

☐ On HSP page or attachment # ______, the official document(s) (*i.e.*, a law, regulation, binding policy directive, letter from the Governor or court order) demonstrates that the State maintains and allows public inspection of statistical information on the race and ethnicity of the driver for each motor vehicle stop made by a law enforcement officer on a Federal-aid highway.

☐ On HSP page or attachment # ______, the State will undertake projects during the fiscal year of the grant to maintain and allow public inspection of statistical information on the race and ethnicity of the driver for each motor vehicle stop made by a law enforcement officer on a Federal-aid highway.

In my capacity as the Governor's Representative for Highway Safety, I hereby provide the following certifications and assurances—

- I have reviewed the above information in support of the State's application for 23 U.S.C. 405 and Section 1906 grants, and based on my review, the information is accurate and complete to the best of my personal knowledge.
- As condition of each grant awarded, the State will use these grant funds in accordance with the specific statutory and regulatory requirements of that grant, and will comply with all applicable laws, regulations, and financial and programmatic requirements for Federal grants.
- I understand and accept that incorrect, incomplete, or untimely information submitted in support of the State's application may result in the denial of a grant award.

I understand that my statements in support of the State's application for Federal grant funds are statements upon which the Federal Government will rely in determining qualification for grant funds, and that

knowing misstatements may be subject to civil or criminal penalties under 18 U.S.C. 1001. I sign these Certifications and Assurances based on personal knowledge, and after appropriate inquiry.

Signature Governor's Representative for Highway Safety

Date

Printed name of Governor's Representative for Highway Safety

Appendix C to Part 1300—Participation by Political Subdivisions

(a) Policy. To ensure compliance with the provisions of 23 U.S.C. 402(b)(1)(C) and 23 U.S.C. 402(h)(2), which require that at least 40 percent or 95 percent of all Federal funds apportioned under Section 402 to the State (except the District of Columbia, Puerto Rico, U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands) or the Secretary of Interior, respectively, will be expended by political subdivisions of the State, including Indian tribal governments, in carrying out local highway safety programs, the NHTSA Regional Administrator will determine if the political subdivisions had an active voice in the initiation, development and implementation of the programs for which funds apportioned under 23 U.S.C. 402 are expended.

(b) Terms.

Local participation refers to the minimum 40 percent or 95 percent (Indian Nations) that must be expended by or for the benefit of political subdivisions.

Political subdivision includes Indian tribes, for purpose and application to the apportionment to the Secretary of Interior.

(c) Determining local share.

(1) In determining whether a State meets the local share requirement in a fiscal year, NHTSA will apply the requirement sequentially to each fiscal year's apportionments, treating all apportionments made from a single fiscal year's authorizations as a single entity for this purpose. Therefore, at least 40 percent of each State's apportionments (or at least 95 percent of the apportionment to the Secretary of Interior) from each year's authorizations must be used in the highway safety programs of its political subdivisions prior to the period when funds would normally lapse. The local participation requirement is applicable to the State's total federally funded safety program irrespective of Standard designation or Agency responsibility.

(2) When Federal funds apportioned under 23 U.S.C. 402 are expended by a political subdivision, such expenditures are clearly part of the local share. Local highway safety-project-related expenditures and associated indirect costs, which are reimbursable to the grantee local governments, are classifiable as local share. Illustrations of such expenditures are the costs incurred by a local government in planning and administration of highway safety project-related activities, such as occupant protection, traffic records system improvements, emergency medical services, pedestrian and bicycle safety activities, police traffic services, alcohol and other drug countermeasures, motorcycle safety, and speed control.

(3) When Federal funds apportioned under 23 U.S.C. 402 are expended by a State agency for the benefit of a political subdivision, such funds may be considered as part of the local share, provided that the political subdivision has had an active voice in the initiation, development, and implementation of the programs for which such funds are expended. A State may not arbitrarily ascribe State agency expenditures as "benefitting local government." Where political subdivisions have had an active voice in the initiation, development, and implementation of a particular program or activity, and a political subdivision which has not had such active voice agrees in advance of implementation to accept the benefits of the program, the Federal share of the cost of such benefits may be credited toward meeting the local participation requirement. Where no political subdivisions have had an active voice in the initiation, development, and implementation of a particular program, but a political subdivision requests the benefits of the program as part of the local government's highway safety program, the Federal share of the cost of such benefits may be credited toward meeting the local participation requirement. Evidence of consent and acceptance of the work, goods or services on behalf of the local government must be established and maintained on file by the State until all funds authorized for a specific year are expended and audits completed.

(4) State agency expenditures which are generally not classified as local are within such areas as vehicle inspection, vehicle registration and driver licensing. However, where these areas provide funding for services such as driver improvement tasks administered by traffic courts, or where they furnish computer support for local government requests for traffic record searches, these expenditures are classifiable as benefitting local programs.

(d) Waivers. While the local participation requirement may be waived in whole or in part by the NHTSA Administrator, it is expected that each State program will generate political subdivision participation to the extent required by the Act so that requests for waivers will be minimized. Where a waiver is requested, however, it must be documented at least by a conclusive showing of the absence of legal authority over highway safety activities at the political subdivision levels of the State and must recommend the appropriate percentage participation to be applied in lieu of the local share.

Appendix D to Part 1300—Planning and Administration (P&A) Costs

(a) Policy. Federal participation in P&A activities shall not exceed 50 percent of the total cost of such activities, or the applicable sliding scale rate in accordance with 23 U.S.C. 120. The Federal contribution for P&A activities shall not exceed 13 percent of the total funds the State receives under 23 U.S.C. 402. In accordance with 23 U.S.C. 120(i), the Federal share payable for projects in the U.S. Virgin Islands, Guam, American Samoa and the Commonwealth of the Northern Mariana Islands shall be 100 percent. The Indian country, as defined by 23 U.S.C. 402(h), is exempt from these provisions. NHTSA funds shall be used only to finance P&A activities attributable to NHTSA programs.

(b) Terms.

Direct costs are those costs identified specifically with a particular planning and administration activity or project. The salary of an accountant on the State Highway Safety Agency staff is an example of a direct cost attributable to P&A. The salary of a DWI (Driving While Intoxicated) enforcement officer is an example of direct cost attributable to a project.

Indirect costs are those costs (1) incurred for a common or joint purpose benefiting more than one cost objective within a governmental unit and (2) not readily assignable to the project specifically benefited. For example, centralized support services such as personnel, procurement, and budgeting would be indirect costs.

Planning and administration (P&A) costs are those direct and indirect costs that are attributable to the management of the Highway Safety Agency. Such costs could include salaries, related personnel benefits, travel expenses, and rental costs specific to the Highway Safety Agency.

Program management costs are those costs attributable to a program area (*e.g.*, salary and travel expenses of an impaired driving program manager/coordinator of a State Highway Safety Agency).

(c) Procedures. (1) P&A activities and related costs shall be described in the P&A module of the State's Highway Safety Plan. The State's matching share shall be determined on the basis of the total P&A costs in the module. Federal participation shall not exceed 50 percent (or the applicable sliding scale) of the total P&A costs. A State shall not use NHTSA funds to pay more than 50 percent of the P&A costs attributable to NHTSA programs. In addition, the Federal contribution for P&A activities shall not exceed 13 percent of the total funds in the State received under 23 U.S.C. 402 each fiscal year.

(2) A State at its option may allocate salary and related costs of State highway safety agency employees to one of the following:

(i) P&A;

(ii) Program management of one or more program areas contained in the HSP; or

(iii) Combination of P&A activities and the program management activities in one or more program areas.

(3) If an employee works solely performing P&A activities, the total salary and related costs may be programmed to P&A. If the employee works performing program management activities in one or more program areas, the total salary and related costs may be charged directly to the appropriate area(s). If an employee is working time on a combination of P&A and program management activities, the total salary and related costs may be charged to P&A and the appropriate program area(s) based on the actual time worked under each

area(s). If the State Highway Safety Agency elects to allocate costs based on actual time spent on an activity, the State Highway Safety Agency must keep accurate time records showing the work activities for each employee.

Issued on: May 16, 2016.

Mark R. Rosekind,

Administrator, National Highway Traffic Safety Administration.

[FR Doc. 2016–11819 Filed 5–20–16; 8:45 am]

BILLING CODE 4910–59–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
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1985

FEDERAL REGISTER

Vol. 81 Monday,
No. 99 May 23, 2016

Part IV

The President

Proclamation 9450—National Hepatitis Testing Day, 2016
Executive Order 13729—A Comprehensive Approach to Atrocity Prevention and Response

Federal Register
Vol. 81, No. 99
Monday, May 23, 2016

Presidential Documents

Title 3—

The President

Proclamation 9450 of May 18, 2016

National Hepatitis Testing Day, 2016

By the President of the United States of America

A Proclamation

In the United States, hepatitis A, B, and C are the most common types of viral hepatitis—affecting between 3.5 and 6.9 million people and claiming the lives of thousands of our fellow Americans each year. Because of the persistent efforts of researchers, advocates, and so many others in the medical and public health communities, we have made great strides in advancing treatment of and finding cures for viral hepatitis. Individuals living with hepatitis B and C can only benefit from these advances if they are tested and made aware of their disease. On National Hepatitis Testing Day, we reaffirm the importance of educating people about viral hepatitis, and we encourage individuals at risk for hepatitis B and hepatitis C to get tested.

More than half of Americans living with viral hepatitis are unaware of their infection status. This lack of awareness contributes to an increasing number of infections and deaths that could be prevented by people receiving the care and treatment they need. When left undiagnosed and untreated, viral hepatitis can cause serious damage to the liver—it is the leading cause of liver cancer and the most common reason for liver transplantation. Symptoms of viral hepatitis can go undetected for many years, which is why it is important to receive vaccines for hepatitis A and B, and blood tests for hepatitis B and C—measures that can be life-saving for those living with this disease. I urge all Americans to visit www.CDC.gov/Hepatitis for more information.

Prevention and early detection are key to combating viral hepatitis, and my Administration remains dedicated to ensuring all Americans have access to the quality, affordable health care they deserve. The Affordable Care Act requires coverage of recommended services that can help prevent, detect, and treat viral hepatitis—including viral hepatitis vaccinations and testing. In addition, the Act prohibits insurers from denying coverage to anyone with a preexisting condition, like viral hepatitis. We have also released a roadmap for ensuring our Federal efforts to address viral hepatitis are coordinated and focused on making more people living with viral hepatitis aware of their status. The Action Plan for the Prevention, Care, and Treatment of Viral Hepatitis, available at www.HHS.gov/Hepatitis, spans more than 20 Federal entities and it moves us toward increasing the number of people who are aware of their infection status, reducing the number of new cases of hepatitis C, and eliminating the transmission of hepatitis B between mother and child.

I have proposed funding to support a new initiative aimed at expanding testing and access to treatment of hepatitis C for people living with HIV and to advance efforts to eliminate hepatitis C transmission and deaths. Those living with HIV are more vulnerable to viral hepatitis infections, and African Americans, Asian Americans and Pacific Islanders, and American Indians and Alaska Natives are also disproportionately affected. Viral hepatitis infections, particularly among young people, can be reduced by addressing the heroin epidemic and abuse of prescription opioids—a priority for my Administration—and by ensuring that individuals who inject drugs have access to treatment services for HIV, viral hepatitis, and substance use disorders. We have taken action to expand access to treatment and increase community prevention strategies so more Americans can get the help they need.

On this day, let us rededicate ourselves to ensuring all people with viral hepatitis know their infection status and have access to necessary care and resources. Let us honor those we have lost too soon, and let us recognize the many individuals working tirelessly to address this disease, develop treatments, and save lives.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim May 19, 2016, as National Hepatitis Testing Day. I encourage citizens, Government agencies, non-profit organizations, and communities across the Nation to join in activities that will increase awareness about viral hepatitis and the need for expanded testing.

IN WITNESS WHEREOF, I have hereunto set my hand this eighteenth day of May, in the year of our Lord two thousand sixteen, and of the Independence of the United States of America the two hundred and fortieth.

[FR Doc. 2016–12306
Filed 5–20–16; 11:15 am]
Billing code 3295–F6–P

Presidential Documents

Executive Order 13729 of May 18, 2016

A Comprehensive Approach to Atrocity Prevention and Response

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Policy.* As articulated in Presidential Study Directive-10 (PSD–10), preventing mass atrocities and genocide is a core national security interest and a core moral responsibility of the United States. Noting that governmental engagement on mass atrocities and genocide too often arrives too late, when opportunities for prevention or low-cost, low-risk action have been missed, PSD–10 directed the establishment of an interagency Atrocities Prevention Board (Board), with the primary purpose of coordinating a whole-of-government approach to prevent mass atrocities and genocide. PSD–10 also directed an interagency study to develop and recommend the membership, mandate, structure, operational protocols, authorities, and support necessary for the Board to coordinate and develop atrocity prevention and response policy. This order continues in place the Board established in 2012 as I directed in PSD–10, sets out the support to be afforded by executive departments, agencies, and offices, and updates and memorializes the terms on which the Board will continue to operate in the service of its important mission.

Sec. 2. *Definition.* For purposes of this order, the term "mass atrocities" or "atrocities," neither of which is defined under international law, refers to large scale and deliberate attacks on civilians, and includes acts falling within the definition "genocide" as defined in international law and under U.S. domestic statute.

Sec. 3. *Responsibilities.* The Board shall seek to ensure that mass atrocities and the risk thereof are effectively considered and appropriately addressed by the U.S. Government, and shall coordinate the development and execution of policies and tools to enhance our capacity to prevent and respond to mass atrocities.

(a) In order to ensure that emerging mass atrocity risks and mass atrocity situations are considered and addressed, the Board shall monitor developments around the world that heighten the risk of mass atrocities, and analyze and closely review specific mass atrocity threats or situations of heightened concern.

(b) The Board shall also identify any gaps related to the prevention of and response to mass atrocities in the current policies and ongoing interagency processes concerning particular regions or countries and shall make recommendations to strengthen policies, programs, resources, and tools related to mass atrocity prevention and response to relevant executive departments and agencies (agencies), including through the Board's function as an interagency policy committee, as detailed in section 4 of this order. In these efforts, the Board shall focus in particular on ways for the U.S. Government to develop, strengthen, and enhance its capabilities to:

(i) monitor, receive early warning of, and coordinate responses to potential mass atrocities;

(ii) deter and isolate perpetrators of mass atrocities through all available and appropriate authorities;

(iii) promote accountability of and deny impunity for perpetrators of mass atrocities, including by denying safe haven for perpetrators found in the United States;

(iv) engage allies and partners, including the United Nations and other multilateral and regional institutions, to build capacity and mobilize action for preventing and responding to mass atrocities;

(v) deploy civilian personnel with expertise in conflict prevention, civilian protection, mediation, and other relevant skills, including on a rapid response basis, to assist in mass atrocity prevention and response efforts;

(vi) increase capacity for our diplomats, armed services, development professionals, and other actors to engage in mass atrocity prevention and response activities;

(vii) develop and implement tailored foreign assistance programs as well as doctrine for our armed services to address and mitigate the risks of mass atrocities;

(viii) ensure intelligence collection, analysis, and sharing of information, as appropriate, relating to mass atrocity threats and situations; and

(ix) address any other issue regarding mass atrocity prevention and response that the Board determines is appropriate.

Sec. 4. *Structure and Protocols of the Atrocities Prevention Board.* The Board shall continue to operate and will have the following structure and protocols:

(a) The Board shall function as an interagency policy committee, or body of equivalent standing, chaired by a member of the National Security Council staff at the Senior Director level or higher who shall be designated by the President (Chair).

(b) The Chair shall convene the Board on a monthly basis to perform the responsibilities set forth in section 3 of this order. The Board shall also meet as needed on an ad hoc and time-sensitive basis to consider and address emerging mass atrocity threats or situations.

(c) The Deputies Committee of the National Security Council (Deputies) shall meet at least twice per year, and the Principals Committee of the National Security Council (Principals) shall meet at least once per year, to review and direct the work of the Board.

(d) The Board shall be composed of individuals at the Assistant Secretary-level or higher who shall be designated by the leadership of their respective departments or agencies. Within 60 days of a vacancy on the Board, the relevant department or agency or office head shall designate a replacement representative and notify the National Security Advisor. In addition to the Chair, the Board shall consist of the designated representatives from the following:

(i) the Office of the Vice President;

(ii) the Department of State;

(iii) the Department of the Treasury;

(iv) the Department of Defense;

(v) the Department of Justice;

(vi) the Department of Homeland Security;

(vii) the U.S. Mission to the United Nations;

(viii) the Office of the Director of National Intelligence;

(ix) the Central Intelligence Agency;

(x) the U.S. Agency for International Development;

(xi) the Joint Chiefs of Staff; and

(xii) such other agencies or offices as may request to participate in coordination with the Chair.

(e) The Chair shall report, through the National Security Advisor, to the President by April 30 each year on the work of the U.S. Government in mass atrocity prevention and response, including the work of the Board.

(f) The Chair shall prepare written updates for the public, on an annual basis, on the work of the U.S. Government in mass atrocity prevention and response, including the work of the Board.

(g) Consistent with the objectives set out in this order and in accordance with applicable law, the Board shall conduct outreach, including regular consultations, with representatives of nongovernmental organizations with expertise in mass atrocity prevention and response and other appropriate parties. Such outreach shall be for the purpose of assisting the Board with its work on considering and addressing emerging mass atrocity threats or situations and on developing new or improved policies and tools, as well as for the purpose of providing transparency on the work of the Board.

(h) In order to conduct the work set forth in this order effectively, the Board may:

(i) request information or analysis from the Intelligence Community (IC), Chiefs of Mission, agencies, and offices;

(ii) develop policy recommendations and programmatic recommendations for agencies, offices, and existing interagency processes;

(iii) in conjunction with existing interagency processes, formulate policy recommendations and programmatic recommendations;

(iv) coordinate with the Office of Management and Budget (OMB) to develop guidance on mass atrocity prevention resource priorities for agencies and offices; and

(v) bring urgent or significant matters to the attention of the Deputies and, as appropriate, request that the Deputies convene to address a situation of concern, consistent with Presidential Policy Directive-1 or its successor.

Sec. 5. *Enhancing Capabilities and Tools.* Agencies shall take the following actions in support of the United States Government's policy of working to prevent and respond to mass atrocities:

(a) Agencies, in coordination with the Board, shall ensure that mass atrocity prevention and response staffing, training, funding, and activities are addressed in their strategic planning and budget processes, including Department Quadrennial Reviews, Mission Resource Requests, State Department Integrated Country Strategies, U.S. Agency for International Development (USAID) Joint Strategic Plans, State Department Bureau Strategic Resource Plans, and related strategic planning and budget processes and documents. The Chair shall make recommendations to the National Security Advisor on the inclusion of material in the President's National Security Strategy that addresses mass atrocity prevention and response.

(b) The Department of State and USAID shall work with OMB to support the maintenance of civilian assistance accounts and authorities that enable swift civilian responses to mass atrocity threats and situations.

(c) The Department of State and USAID shall offer mass atrocity prevention and response training courses to all officers deployed or planning deployment to countries deemed by the IC to be at high or substantial risk for mass atrocities.

(d) The Department of State and USAID shall continue to build and use civilian capacity (i.e., the ability to deploy personnel with expertise in conflict prevention, civilian protection, mediation, and other relevant skills) effectively for mass atrocity prevention and response, and shall develop mechanisms for enhanced partnerships with non-U.S. Government actors that could provide surge capacity, such as the United Nations and other multilateral and regional organizations, foreign governments, and nongovernmental organizations.

(e) The IC shall continue to monitor developments worldwide and, as changing conditions warrant, prepare an IC-coordinated assessment updating IC judgments in its National Intelligence Estimate on the global risk of mass atrocities and genocide at regular intervals to inform the work of the Board.

(f) Recognizing mass atrocity prevention as a core national security interest of the United States, the IC shall allocate resources so as to permit a collection surge for countries where the Board determines, and the Deputies concur, that there are ongoing or acute risks of mass atrocities that merit increased attention, in accordance with the National Intelligence Priority Framework and available resources.

(g) The IC shall work with partner governments to encourage the collection and analysis of mass atrocity-related intelligence and the sharing of this intelligence with the U.S. Government and its partners in mass atrocity prevention and response.

(h) The Department of Homeland Security (DHS) and the Department of Justice, in coordination with the Department of State, shall continue to develop proposals for legislative, regulatory, or administrative amendments or changes that would permit the more effective use and enforcement of immigration and other laws to deny impunity to perpetrators of mass atrocities and that would enhance our ability to prosecute such perpetrators subject to the jurisdiction of the United States and remove those who are not citizens.

(i) The Department of Defense (DOD) shall continue to develop joint doctrine and training that support mass atrocity prevention and response operations and shall address mass atrocity prevention and response as part of its general planning guidance to combatant commands and services.

(j) The Department of State, the Department of the Treasury, DHS, the U.S. Mission to the United Nations (USUN), and other agencies as appropriate, shall coordinate with bilateral and multilateral partners on the deployment of mass atrocity prevention and response tools, including isolating and deterring perpetrators of mass atrocities through all available authorities (including administrative actions, visa authorities, and capacity-building support), as appropriate.

(k) The Department of State, in coordination with USUN, DOD, and other agencies as appropriate, shall work bilaterally, multilaterally, and with regionally based organizations to enhance effectiveness in the fields of early warning, analysis, prevention, response, and accountability, and shall work with international partners to build or encourage building the capacity of our allies and partners to prevent and respond to mass atrocities.

Sec. 6. *General Provisions.* (a) Members of the Board shall serve without any additional compensation for their work on the Board.

(b) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department, agency, or the head thereof, or the status of that department or agency within the Federal Government; or

(ii) the functions of the Director of OMB relating to budgetary, administrative, or legislative proposals.

(c) This order shall be implemented consistent with applicable law, and subject to the availability of appropriations.

(d) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,
May 18, 2016.

[FR Doc. 2016–12307
Filed 5–20–16; 11:15 am]
Billing code 3295–F6–P

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